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No. .....

In The

Supreme Court of the United States

October Term, 1984

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CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether criminal defense lawyers provide ineffective assistance of counsel by persuading their client not to commit perjury at his trial when their successful effort to prevent him from lying on the stand wins unanimous praise from the state supreme court and the conduct of the attorneys does not prejudice their client at trial.

2. Whether criminal defense lawyers, who, as officers of the court, admonish their client that they will take steps necessary to prevent him from committing perjury, violate their client's right to testify when the client subsequently abandons the perjury scheme and takes the stand in his own defense.

3. Whether criminal defense lawyers, who privately and confidentially persuade their client not to commit perjury on the stand, act in a fashion which causes a violation of their client's right to due process of law when the judge and jury at his state court trial are not informed of the defendant's abandoned perjury plan.

4. Whether a federal Court of Appeals should use federal habeas corpus as a vehicle for resolving a dispute of legal ethics that has divided the bar for many years in order to reverse a state court criminal conviction where the fact-finding process of the state court proceeding has not been impugned.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Crispus Nix, Warden of the Iowa State Penitentiary, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals granting respondent herein a writ of habeas corpus on September 19, 1984 (rehearing en banc denied by a five-four vote on December 24, 1984).

OPINION BELOW

The opinion of the Court of Appeals is reported at 744 F.2d 1323 (8th Cir. 1984) and presented in the Appendix A of this petition for the convenience of the Court. (A1-21) The order denying rehearing en banc is not yet reported but appears as Appendix B. The opinion of the Iowa Supreme Court, *State v. Whiteside*, 272 N.W.2d 468 (Iowa 1978), and the unreported opinion of the United States District Court for the Southern District of Iowa, *Whiteside v. Scurr*, Civil No. 81-246-C (S.D. Iowa 1981), also are included in Appendices C and D (A35-40) (A41-43).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 19, 1984. (A1) On November 13, 1984, United States Supreme Court Associate Justice Harry A. Blackmun entered an order extending the time for filing a petition for writ of certiorari until February 16, 1985. (A44) This petition for certiorari is filed within the time period as extended by Justice Blackmun in his November 13, 1984, order. The Court's jurisdiction is invoked under 28 U.S.C. Section 1243(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law. . . .

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

Fourteenth Amendment, United States Constitution

> No state . . . shall . . . deprive any person of life, liberty, or property without due process of law.

United States Code Title 28, Section 2254(d)

> In any proceeding instituted by a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State Court, a determination after a hearing on the merits of a factual issue . . . shall be presumed correct . . .

STATEMENT OF FACTS

On February 8, 1977, Calvin Love was stabbed to death in connection with a drug transaction in his apartment in Cedar Rapids, Iowa. The state charged Emmanuel Charles Whiteside with the murder of Love. The Iowa District Court originally appointed Thomas M. Horan and Timothy S. White to represent Whiteside. (A46)[1]

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[1]For the convenience of the Court, excerpts from the record are included in the Appendix to this petition. Full citations to the record have been omitted from the text but may be found in the Appendix.

Whiteside "didn't feel comfortable" with Horan and White because they were former prosecutors (A58), and sought to have Thomas L. Koehler replace them. The problem with this proposal was that an associate in Koehler's law firm had undertaken to represent Derrick Doolin, who was also present at the scene at the time of Love's murder. (A46-48)

Notwithstanding the potential conflict of interest, Whiteside adamantly insisted on representation by Koehler. Only after two court hearings and numerous consultations with White, Horan, and Koehler, was Whiteside finally convinced to accept representation from Gary L. Robinson. (A53)

According to Robinson, Whiteside consistently told his lawyers as they prepared his defense that he did not actually see a gun in Love's possession, but he was nevertheless convinced that Love had a gun. (A79) Robinson conducted a thorough investigation, concluding that Love in fact did not have a gun at the time of the homicide. (A78-32)

About a week prior to trial, Robinson and an associate, Donna Paulsen, were reviewing questions the attorneys had written with Whiteside in preparation for trial. In response to one of the questions at the practice session, Whiteside shocked his lawyers by stating that he intended to testify that he had seen something "metallic" just before he stabbed Love. When Paulsen asked him why he had never mentioned that before, Robinson recalled that Whiteside declared, "If I don't say I saw a gun, I'm dead." (A85)

At a hearing on Whiteside's motion for a new trial, Robinson stated that he responded to the unexpected de-

velopment by explaining to Whiteside that it was not necessary for a gun to be present in order to establish self defense, and that to claim falsely that he actually saw a gun would be perjury. Robinson recalled that he told his client that he and his associate, "as officers of the court, we would be suborning perjury if we allowed him to do it" and admonished him that if he committed perjury that "it would be my duty to advise the Court what he was doing." Robinson also testified that he told his client that if he persisted, he would "ask the court for permission to withdraw" and that he "probably would be allowed to impeach that particular testimony" if Whiteside actually perjured himself on the stand. (A85, 89)

Whiteside himself also testified at the post-trial hearing. He told the court that while he wouldn't say he had a conflict with his attorney over his proposed testimony, "I got the impression at one time that maybe if I didn't go along with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." (A70) Whiteside made no mention of "threats" by Robinson to advise the court or testify against him.

Whatever the character of Robinson's admonitions, Whiteside elected to take the stand and not falsely claim that he actually saw a gun on the person of Calvin Love. The jury convicted him of second degree murder. He then filed a motion for a new trial which alleged, in part, that Robinson provided ineffective assistance of counsel by coercing him to alter his testimony. The state district court found the facts to be as testified by Robinson and denied the motion.

Whiteside appealed to the Iowa Supreme Court, which upheld the conviction. On the issue of Robinson's efforts

to prevent Whiteside from testifying that Love had a gun, the Court affirmed the finding of the trial court that counsel properly refused to be a partner in a dishonest and deceitful scheme. *State v. Whiteside,* 272 N.W.2d 468, 471 (Iowa 1978). (A37)

Whiteside then filed a habeas corpus action in federal court. The district court, accepting the state court's factual finding that Whiteside intended to testify falsely, as required by 28 U.S.C. § 2254(d), dispatched Whiteside's claim with the terse observation that because there is no constitutional right to perjure oneself, Whiteside was not entitled to relief. *Whiteside v. Scurr,* Civ. No. 81-246-C, at 2 (S.D. Iowa 1981). (A43)

The Court of Appeals, however, reversed the district court. While the court also accepted the factual finding of the state court that Whiteside was proposing to testify falsely, 755 F.2d at 1338 (A8), the panel nevertheless held that Whiteside's attorney, through his admonitions to his client, had deprived Whiteside of effective assistance of counsel, due process, and a constitutionally-based right to testify on his own behalf. (A1-21)

The state's suggestion for rehearing en banc was denied by a five to four margin of the Court of Appeals. Judge John R. Gibson, joined by three colleagues, wrote a dissenting opinion which, citing *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), argued that because no prejudice to the petitioner had been demonstrated, the petition for writ of habeas corpus should be denied. *Whiteside v. Scurr,* Slip. Op. 2-5 (Dec. 24, 1984). (A26-30) Judge Fagg, also joined by three judges, wrote in a separate dissent that ineffective assistance of coun-

sel does not occur when an attorney convinces his client to testify truthfully in a criminal proceeding. *Id.*, Slip Op. at 5-9. (A30-34)

The Court of Appeals denied a stay of mandate pending determination of a petition for certiorari to this Court. Upon application by the petitioner and after the filing of a response from the respondent, Justice Blackmun granted a stay pending the timely filing and ultimate disposition of a petition for certiorari by this Court. (A44)

REASONS FOR GRANTING THE WRIT

I. THE INEFFECTIVE ASSISTANCE OF COUNSEL HOLDING OF THE FEDERAL COURT OF APPEALS THREATENS TO UNDERMINE THE STABILITY AND RELIABILITY OF THE FACT-FINDING PROCESS AT STATE CRIMINAL TRIALS.

The ineffective assistance of counsel holding of the Court of Appeals in this habeas corpus proceeding is an intolerable precedent that should be reviewed by this Court in order to avoid immediate and substantial damage to the administration of criminal justice. By obliterating the requirements for ineffective assistance of counsel claims established in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1980), the federal Court of Appeals granted a criminal defendant a new state court trial where the only claim of professional error was that a defendant's lawyers successfully persuaded their client not to commit perjury.

A brief review of *Strickland v. Washington* reveals the scope of the error in the Court of Appeals' approach to the ineffectiveness of counsel issue. In *Strickland,* this Court reemphasized the need to make the trial of the accused the main event in the criminal justice system and the desirability of avoiding what amount to second trials over the effectiveness of counsel in which the defense attorney is the defendant. *Strickland v. Washington,* — U.S. at —, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. *See also Engle v. Isaac,* 456 U.S. 107, 127 (1982); *Wainwright v. Sykes,* 433 U.S. 72, 90 (1977). As a result, this Court articulated a two pronged test for claims of ineffective assistance. First, it must be demonstrated that the identified acts or omissions of counsel were outside the wide range of professionally competent assistance. Second, it must be shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington,* — U.S. at —, 104 S.Ct. at 2064-2068, 80 L.Ed.2d at 695-698.

In this case, it is difficult to see that the lawyers did anything wrong at all, let alone committed professional errors that, as apparently found by the Court of Appeals, were so "outside the wide range of professionally competent assistance" as to give rise to a constitutional claim of ineffective assistance of counsel. *Strickland v. Washington,* — U.S. at —, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. The lawyers simply told their client in no uncertain terms that they would have nothing to do with his patently false testimony and that they would actively seek to prevent their client from committing the crime of perjury at trial.

The lawyers' action in this case is entirely consistent with the directions provided to practicing attorneys in the

ABA/BNA Lawyers' Manual on Professional Conduct, a leading desk reference on professional ethics. According to the manual, "A lawyer may not knowingly introduce perjured testimony, whether or not the client is the witness." Moreover, the desk reference further advises lawyers that, while there is a split of authority, "the majority of jurisdictions hold that reasonable remedial measures must be taken" if a client testifies falsely "even if such measures require the disclosure of otherwise confidential information." ABA/BNA Lawyers Manual on Professional Conduct, § 61:401 (1984). *See e.g. People v. Lewis,* 75 Ill. App. 560, 393 N.E.2d 1380, 1384 (1979).

The Iowa Supreme Court followed the majority rule. The state high court noted that under Iowa Code of Professional Responsibility, a lawyer may reveal "the intention of his client to commit a crime and the information necessary to prevent the crime," and should represent a client zealously "within the bounds of the law." Iowa Code of Professional Responsibility, Canons 4, 7. The Court further observed that a lawyer who knowingly uses perjured testimony or aids a client to commit a criminal act could also be subject to prosecution for suborning perjury. Under the circumstances, the court praised the attorneys "for the high ethical manner" in which the matter was handled. *State v. Whiteside,* 272 N.W.2d 468, 471 (Iowa 1978). *See also State v. Henderson,* 205 Kan. 231, 468 P.2d 136, 140-1 (1970).

Given the majority position, it is surprising that the Court of Appeals reached such a dramatically different conclusion. According to the Court of Appeals, "counsel's actions, in particular the threat to testify against appel-

lant, indicate that a conflict of interest had developed between counsel and appellant, even though this conflict was admittedly precipitated by appellant's intention to testify falsely." "At this point," wrote the Court, "counsel had become a potential adversary and ceased to serve as a zealous advocate of appellant's interests." *Whiteside v. Scurr*, 744 F.2d at 1329. (A11)

The Court of Appeals attempts to contain the damage to the integrity of the courts and lawyers by attempting to limit its ineffective assistance of counsel holding to situations where an attorney admonishes his client with a "threat to testify" against him. *See Whiteside v. Scurr*, 744 F.2d at 1331.[2] The panel opinion, however, contains language that is much broader than its disclaimer suggests. For instance, the panel opinion states that "counsel's ac-

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[2]The "threat," as remembered by lawyer Robinson, was a statement that he "probably would be allowed to impeach that particular testimony" if Whiteside took the stand and lied. (A85) This statement is most reasonably construed not as a threat by the lawyer to actually take the stand as a rebuttal witness, but simply to correct misimpressions through cross-examination of the lawyer's own witness. *See United States v. Petras*, 592 F.2d 525 (9th Cir. 1979), *cert. denied*, 422 U.S. 910 (1979). From the narrow perspective of client self interest, impeachment through questioning by his own lawyer, with opportunities for self correction, is far preferrable than exposure to cross-examination by the prosecutor. *See e.g. U.S. v. Bad Cob*, 560 F.2d 877, 883 (8th Cir. 1977) (Introduction by a witness himself of his prior conviction is a common trial tactic recommended by text writers on trial practice.).

In addition, Whiteside does not recall any "threat to testify." At the hearing on his motion for a new trial, he only recalled that his lawyer asked Whiteside if he wanted his attorney to withdraw. (A70) As a result, it is clear that Whiteside himself did not remember, and did not rely on, any "threat" by his attorney to testify as a rebuttal witness when he abandoned his perjury scheme. If it were true that the "threat to testify" was the linchpin of the opinion, this Court would have a clear basis for summary reversal.

tion in threatening to withdraw, advise the state court trial judge, and testify against appellant if the appellant testified falsely, impermissibly compromised appellant's right to effective assistance of counsel." *Whiteside v. Scurr*, 744 F.2d at 1329. (A12) This sweeping declaration provides no effective guidance for lower courts and attorneys who grapple with client perjury issues.[3]

In addition to the very doubtful handling of the effectiveness of counsel issue, the Court of Appeals' handling of the prejudice prong of *Strickland v. Washington*, is also highly suspect. According to the Court of Appeals, no prejudice need be shown because of the presence of an actual conflict of interest between the attorneys, who seek to prevent their client from committing perjury, and their client. *See Whiteside v. Scurr*, 744 F.2d at 1330. (A13) As a result, the Court of Appeals set aside Whiteside's conviction even though there was utterly no showing that he was prejudiced by the conduct of his attorneys.

It is true that this Court has, in limited circumstances involving multiple representation of clients by one lawyer or law firm, waived the conventional actual prejudice requirement in the effective assistance of counsel context. In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), for instance, this Court held that where a lawyer represents two or more defendants in the same criminal proceeding, there is no need to "indulge in nice calculations as to the amount

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[3]See also the broad alternate holding of the Court of Appeals on the "right to testify" issue, where the Court declares that counsel's action "impermissibly compromised appellant's right to testify in his own defense by conditioning representation by counsel and confidentiality upon appellant's restricted testimony." 744 F.2d at 1329 (A12). This rule of law has implications far beyond factual settings involving so-called threats of attorneys to testify against their clients.

of prejudice attributable to the conflict" once it is shown that an actual conflict of interest adversely affects the lawyer's performance. 466 U.S. at 449.

But in this case, there is no "actual conflict of interest." A conflict of interest implies the collision of two legally recognized rights. Because Whiteside had no constitutionally or statutorily recognized right to commit perjury, *Harris v. New York,* 401 U.S. 222 (1971), there was by definition no conflict of interest. *See* Gibson, J., *Whiteside v. Scurr,* Slip Op. at 3 (A27), Fagg, J., *id.,* at 7 (A31)

In addition, the conversations between Whiteside and his lawyer involved, at most, a *potential* conflict of interest. Whiteside told his lawyer that he was prepared to lie on the stand, offering the opinion that "If I don't say I saw a gun, I'm dead." (A85) Had Whiteside persisted in his perjury proposal, the potential conflict might have ripened into an actual conflict of interest.[4] When Whiteside decided not to press the point, the possibility of an actual conflict with his lawyer was averted. *See* Fagg, J., *Whiteside v. Scurr,* Slip. Op. at 7. (A31)

Finally, in order to prevail under the rule of *Cuyler v. Sullivan,* the defendant must identify "an actual lapse in representation." 446 U.S. at 249. But the only "lapse" at trial was the defeat of Whiteside's perjury plan.

It is hard to see how the successful efforts of Whiteside's attorneys to convince their client not to commit per-

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[4]Whiteside himself refused to characterize the discussion between himself and his attorneys as a conflict, (A70), and lawyer Robinson recalls that "he [Whiteside] just dropped it entirely" after their brief conversation. (A89)

jury was a "lapse" of advocacy. Indeed, the effectiveness of counsel would have been more suspect had Whiteside's lawyers allowed him to take the stand and testify falsely that he saw a gun in light of the fact that none of the three eyewitnesses saw a gun and the police search failed to discover a weapon. It is ironic that the Court of Appeals hoisted Whiteside's lawyer on the petard of "ineffective assistance" when his client, had he defied counsel and testified falsely, would have been left to the mercy of a judge and jury who would have likely concluded that Whiteside was not an innocent caught in the law's web, but a culprit who was prepared to lie on the stand in a desperate attempt to save his own skin. *See United States v. Grayson*, 438 U.S. 41 (1978) (sentencing judge may consider apparent perjury of defendant in determining length of incarceration).

In summary, the Court of Appeals seriously misapplied both prongs of *Strickland v. Washington*. The end result of this combination of errors is that any criminal defendant who makes properly phrased claims that his attorney prevented him from committing perjury will be entitled to an evidentiary proceeding attacking his or her conviction on ineffective assistance of counsel grounds without an allegation of prejudice. Specifically, under the holding of the Court of Appeals, a federal court will be required to grant relief to a petitioner who declares, "Judge, I had a really good lie cooked up, but because my lawyer talked me out of it by threatening to expose me if I committed perjury on the stand, I am now entitled to a new trial so that I can try out my story." It is respectfully submitted that this Court should review the judgment and opinion of the Court of Appeals to prevent this untoward result.

II. THE UNPRECEDENTED ALTERNATE HOLDING OF THE COURT OF APPEALS THAT A CONSTITUTIONAL "RIGHT TO TESTIFY" IS VIOLATED WHEN AN ATTORNEY INFORMS A CLIENT THAT THE ATTORNEY WILL WITHDRAW OR ADVISE THE COURT IF THE CLIENT PERSISTS IN HIS PERJURY SCHEME SERIOUSLY UNDERMINES ESTABLISHED PRINCIPLES OF PROFESSIONAL ETHICS.

The Court of Appeals also held that "counsel's action impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony." 744 F.2d at 1329. (A12) This holding reasonably may be construed to mean that whenever a lawyer threatens to withdraw in order to prevent a client from committing perjury, or indeed for any reason relating to the client's wishes with respect to his own testimony, a constitutional violation occurs.

The Court of Appeals' "right to testify" holding is doubtful on the merits. To begin with, there is a substantial question whether there is a constitutionally based "right to testify" at all. It is not expressly contained in the Fifth or Sixth Amendments, and the Court of Appeals is silent about its constitutional source. *See Wright v. Estelle,* 572 F.2d 1071, 1073 (5th Cir. 1978) (Thornberry, J., et al., concurring) (decision whether to testify is properly allocated to defendant's attorney, not to defendant). *But see id.,* at 1074-80 (Godbold, J., dissenting) (right to testify is personal to defendant and of constitutional dimension). The "right to testify" may lurk in the shadows of *Faretta v. California,* 422 U.S. 806 (1975), but it has yet to make a clear appearance in the cases of this Court.

Even assuming there is a "right to testify" of constitutional dimension, it is hard to see how it was violated under the facts and circumstances of this case. A witness in a criminal murder trial, even the defendant, does not have a constitutional right to testify about anything he or she wishes. The testimony of the defendant is subject to numerous restraints such as relevance, the hearsay rule, and other concepts of admissibility. Similarly, a criminal defendant's privilege to testify does not include the right to commit perjury. *Harris v. New York,* 401 U.S. 222, 225 (1971). As a result, the Court of Appeals for the Seventh Circuit has held that an attorney may refuse to put a perjury-determined defendant on the witness stand without impinging on his constitutional right to testify truthfully. *United States v. Curtis,* 742 F.2d 1070 (1984).

The clear conflict between the Seventh Circuit in *Curtis* and the Eighth Circuit in this case on the "right to testify" issue presents a strong reason for this court to grant review. In addition, by holding that counsel committed constitutional error by convincing his client not to take the stand and testify falsely, the Court of Appeals has introduced a novel constitutional concept that will undermine the ability of defense counsel to perform their roles as officers of the court as generally required by the various Codes of Professional Ethics. It will make effective representation more difficult for defense counsel by depriving them of the tools necessary to protect clients from the often patently foolish decision to commit the kind of perjury on the stand that is likely to be detected both by the guilt-finding judge or jury and the sentencing judge. *See Wright v. Estelle,* 572 F.2d at 1073 (Thornberry, J., et al., specially concurring) (the defendant may have a fool

for a client, but not a fool for an attorney). As with the ineffective assistance of counsel holding, the Court's "right to testify" rule will undermine the stability of criminal convictions in cases where defense attorneys prevented their clients from committing perjury by advising them of the actions they would take under the Rules of Professional Responsibility, even though there is absolutely no reason to question the reliability of the original fact-finding process that led to the conviction.

III. THE PANEL'S VAGUE HOLDING THAT WHITESIDE'S ATTORNEYS VIOLATED DUE PROCESS OF LAW PROVIDES NO GUIDANCE FOR LOWER COURTS OR LAWYERS.

As a third ground for reversal, the panel opinion states that "we hold that counsel's action deprived appellant of due process" as well as effective assistance of counsel. *Whiteside v. Scurr,* 744 F.2d at 1328. (A9) The contours of the Court's due process theory are not explored anywhere in the opinion, however, and we are left to speculate exactly what the holding actually means. Apparently, the Court of Appeals believes a defendant may attack his state court conviction in federal court on due process grounds even if it can be demonstrated only that the defendant's lawyer *confidentially* advised the defendant that if he or she insisted on committing perjury on the stand, the lawyer would be required to either withdraw or advise the court of the situation. The Court of Appeals thus seems to extend the previous due process frontier established by the Ninth Circuit in *Lowery v. Cardwell,* 575 F.2d 727 (9th Cir. 1978), where the Court of Appeals dubiously reversed a conviction on due process grounds where the fact finder *actually* knew that the defendant was

committing perjury on the stand. As with the other holdings of the Court of Appeals in this case, this ill-defined rule of law will seriously undermine the integrity of the courts and the lawyers who represent criminal defendants.

IV. THE INEFFECTIVE ASSISTANCE OF COUNSEL/RIGHT TO TESTIFY/DUE PROCESS HOLDINGS OF THE COURT OF APPEALS ESTABLISHES AN UNWORKABLE FRAMEWORK THAT LEAVES DEFENSE COUNSEL WITH NO ACCEPTABLE OPTIONS WHEN CONFRONTED WITH A PERJURY-DETERMINED CLIENT ON THE EVE OF TRIAL.

When the opinion of the Court of Appeals is fully considered, it is clear that it dramatically restricts the options available to an attorney who is confronted with a perjury-determined client on the eve of trial. Apparently concerned about such limitations, the court attempts to appear flexible at places, claiming, for instance, that it expresses "no view on the Sixth Amendment implications of a lawyer's simply moving to withdraw, with or without informing the trial court of the reason." *See Whiteside v. Scurr*, 744 F.2d at 1331. (A14)

The purported option of simple withdrawal, however, is entirely illusory. Most trial judges will not allow an appointed attorney to withdraw on the eve of trial without a compelling reason. When asked for a reason for withdrawal, it will not be sufficient to simply state that the lawyer and client are at odds over defense strategy. *See Morris v. Slappy*, — U.S. —, —, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). And, an attorney who refuses to reveal the reason for nondisclosure will telegraph the character of the problem to an experienced judge, a result disapproved in *Lowery v. Cardwell*, 575 F.2d 727, 730-31 (9th

Cir. 1978). In addition, if a defendant could force an attorney to withdraw simply by declaring his determination to commit perjury shortly before trial, the client could attempt to escape prosecution by repetitively announcing perjury plans to attorneys on the day of trial.

The comment to ABA Model Rule of Professional Responsibility 3.3 (1983) recognizes the possibility that an unscrupulous client might seek to produce a series of mistrials by repetitively insisting on committing perjury. The comment suggests that the solution is to withdraw the right to counsel upon the second offense. *Whiteside v. Scurr,* 744 F.2d at 1333. (A19) This penalty, however, is far more draconian than the so-called "threats" that were made by the defense lawyers in the present case. Lawyers in criminal cases are necessities, not luxuries. *United States v. Cronic,* — U.S. —, 104 S.Ct. 2039, 2043, 80 L.Ed.2d 657, 664 (1984).

The Court of Appeals' apparent remedial flexibility in the effective assistance of counsel area is also substantially limited by its "right to testify" holding. According to the Court, it is "impermissible to condition continued representation and confidentiality upon appellant's restricted testimony." *Whiteside v. Scurr,* 744 F.2d at 1329 (A11) When this holding is read in tandem with the Court's ineffective assistance of counsel holding, the only constitutionally permissible option for an attorney confronted with a perjury-determined client is to continue representation and allow the client to testify as he or she desires.

The constitutional requirement that a defense attorney grudgingly must acquiesce to client perjury is an un-

workable solution to the problem. In order to avoid actively assisting the client in perpetrating the crime of perjury, and indeed expose himself or herself to criminal liability for suborning perjury under state law, the lawyer could not directly question his client about the subject area of the proposed perjury if he took the stand. *In re Branch,* 70 Cal. 2d 200, 74 Cal. Rptr. 238, 449 P.2d 174, 181 (1969). In addition, the lawyer could not make reference to the perjured testimony in closing arguments. The only option, then, is free style narrative without the assistance of questioning from counsel.

Such an awkward evidentiary presentation is not likely to be to the advantage of the lawyer's client at trial. If the trial is before a judge, it will be obvious to the fact-finder that the client is committing perjury. *See* ABA Model Rule of Professional Conduct 3.3, Comment (A18) In this setting, the client plainly would be better served if an attorney is able to persuade his client not to commit perjury in the privacy of pretrial consultations than if the client is simply left to his or her own devices in the court room.

If the case is being tried before a jury, the free style narrative poses a different set of problems. The prosecutor may object to the manner in which the testimony is being presented. The general rule is that the decision whether to permit such a narrative rests with the sound discretion with the judge. *See* Fed. R. of Evid. 611; Iowa R. of Evid. 611(a); *McCormick on Evidence,* 2d Ed., § 5, at 7 (1972). At this point, two troublesome events could occur. First, the trial judge might well simply refuse to allow the witness to testify in a narrative fashion. *Hutter Northern Trust v. Door County Chamber of Commerce,*

467 F.2d 1075, 1078 (7th Cir. 1972). Or, the judge might well ask defense counsel to explain why the unusual procedure is necessary. In either circumstance, the effort to protect the newly discovered "right to testify" from system-imposed influences will be defeated.

In addition, the quality of advocacy offered by the defense counsel will suffer under the free narrative solution. First, without the specific interrogation and guidance of an attorney's questions, the untrained defendant may unwittingly expose himself to devastating cross-examination by unnecessarily opening damaging areas of testimony. Second, the ability of the lawyer to convincingly marshal the evidence in his closing argument, an extremely important stage at a jury trial, will be compromised by his client's dogged exercise of his right to testify falsely. *See Herring v. New York,* 422 U.S. 853, 862 (1975).

In sum, the opinion of the Court of Appeals eliminates the ability of the criminal justice system to work out problems raised by perjury-determined clients on an individual basis with minimum adverse consequences to the lawyers, the courts, and the clients themselves. This Court should review the case to prevent undue disruption to the system which, prior to the disturbing habeas corpus holding of the Court of Appeals, operated satisfactory within the constraints composed by prevailing notions of professional ethics.

———o———

CONCLUSION

For all the above reasons, it is respectfully submitted that the petition for a writ of certiorari in the above-captioned matter should be granted.

Respectfully submitted,

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APPENDIX A

Emmanuel Charles WHITESIDE,
Appellant,

v.

David SCURR, Warden, Appellee.

No. 83-1015.

United States Court of Appeals,
Eighth Circuit.
Submitted May 14, 1984.
Decided Sept. 19, 1984.

Before McMILLIAN, Circuit Judge, BENNETT,* Circuit Judge, and ARNOLD, Circuit Judge.

McMILLIAN, Circuit Judge.

Emmanuel Charles Whiteside appeals from a final judgment entered in the District Court for the Southern District of Iowa denying his petition for writ of habeas corpus. For reversal appellant argues the district court erred in holding that counsel's threats to seek to withdraw, disclose confidential discussions and testify against him did not deny him due process and effective assistance of counsel. For the reasons discussed below, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

A state court jury convicted appellant of second degree murder for the stabbing death of Calvin Love in 1977.

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*The Honorable Marion T. Bennett, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

Appellant was sentenced to forty years imprisonment. Appellant and two companions had gone to Love's apartment to get some marijuana. During an argument about the marijuana, appellant stabbed Love as Love was moving toward him. Appellant's theory of defense was self-defense. According to appellant, Love had been reaching for a gun beneath a pillow when appellant stabbed him. When questioned by defense counsel in preparation for trial, appellant stated that he had not actually seen the gun, but that he thought that he had seen a gun and was convinced that Love had one because Love had a reputation for carrying a gun. Counsel questioned appellant's two companions and Love's girlfriend about the gun. They denied actually seeing a gun, although appellant's companions believed that Love probably did have a gun. Counsel also learned that the police had found no gun during a quick search of the room where the stabbing occurred. Nor had the apartment manager found a gun. Counsel personally searched the room for the gun without success. During the course of his investigation, however, counsel discovered that several hours after the stabbing, Love's girlfriend and his family had forced the police padlock on the apartment and had removed everything from the apartment.

Appellant was anxious about the success of his theory of self-defense if the gun was not found. Counsel had earlier advised appellant that the gun itself was not essential to his theory of self-defense and that the defense would be successful if the jury was convinced that appellant reasonably believed that Love had had a gun. Shortly before trial, appellant told counsel that he had seen something "metallic" in Love's hand just before the stabbing. This

discrepancy precipitated the disagreement between appellant and counsel that underlies this appeal. Counsel told appellant that if he insisted upon testifying that he saw a gun, then he (counsel) would move to withdraw, advise the state trial judge that the testimony was perjurious and testify against him.

At trial appellant testified only that he thought Love had a gun and that he had acted to protect himself from an assault by Love with the gun. Appellant was found guilty of second degree murder. On appeal to the state supreme court appellant argued that counsel's threats to withdraw, advise the state trial judge about his testimony and testify against him prevented him from presenting his defense and thus denied him a fair trial. The state supreme court rejected this argument, finding that "counsel was convinced with good cause to believe [appellant's] proposed testimony would [have been] deliberately untruthful" and that, consistent with the Iowa Code of Professional Responsibility for Lawyers, "[c]ounsel properly refused to be a partner in such a dishonest and deceitful scheme." *State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978). The state supreme court commended counsel for the "high ethical manner" in which the matter was handled. *Id.*

In 1981 appellant filed a petition for writ of habeas corpus alleging that counsel's threats to withdraw, advise the state trial judge and testify against him denied him the right to effective assistance of counsel, the right to present a defense and due process in violation of the fifth, sixth and fourteenth amendments. The district court found that the state courts' finding that appellant would have committed perjury was fairly supported by the record

and that appellant had failed to establish by convincing evidence that this finding was erroneous. *Whiteside v. Scurr,* No. Civil-81-246-C, slip op. at 2 (S.D.Iowa Dec. 7, 1982). The district court noted the constitutional right to testify did not include perjury and concluded that appellant was not denied due process or effective assistance of counsel because counsel prevented him from testifying falsely. *Id.* The district court denied the petition and this appeal followed.

As a preliminary matter, we note that during oral argument the state questioned whether appellant had exhausted available state remedies. The district court concluded that appellant had exhausted his due process and right to present a defense claims but may not have fairly presented the substance of the ineffective assistance of counsel claim to the state supreme court. The district court concluded, however, that because the state supreme court had already determined that the state code of professional responsibility vindicated counsel's actions and had in fact commended counsel for the "high ethical manner" in which the matter had been handled, further state court proceedings would be futile and that appellant was not required to exhaust the ineffective assistance of counsel claim. *Whiteside v. Scurr,* No. Civil-81-246-C, slip op. at 3-4 (S.D.Iowa Feb. 24, 1982) (order).

[1] We agree with the district court that further state court proceedings on the ineffective assistance of counsel claim would be futile. In addition, the ineffective assistance of counsel claim is so closely tied to the due process and right to present a defense claims, which have clearly been exhausted, that these claims should be considered together in this petition. *See Batten v. Scurr,* 649

F.2d 564, 569 (8th Cir. 1981). In the present case appellant's due process, right to present a defense and ineffective assistance of counsel claims represent different legal arguments offered in support of essentially one ground for relief: that his defense counsel's actions prevented him from presenting his defense and denied him a fair trial. *See Sanders v. United States,* 373 U.S. 1, 16, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963). This ground for relief, the underlying facts, and the due process and right to present a defense claims were expressly raised in appellant's state court briefs. Appellant in his state court brief also expressly raised the ineffective assistance of counsel claim in the essentially identical context of conflict of interest between counsel and the defendant and submitted an appendix which included portions of the hearing on the motion for new trial about counsel's threat to seek to withdraw, advise the state trial judge and testify against him. In these circumstances, the substance of appellant's federal habeas corpus ground for relief was fairly presented to the state courts. *See Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982) (per curiam), *citing Picard v. Connor,* 404 U.S. 270, 275, 277-78, 92 S.Ct. 509, 513-514, 30 L.Ed.2d 438 (1971).

The problem presented on the merits in this case is what kind of action defense counsel, representing a defendant in a criminal case, may constitutionally pursue when counsel believes that the client intends to testify falsely. This issue implicates both due process and effective assistance of counsel considerations and has been extensively debated, but by no means resolved, by several courts and many commentators. *See United States v. Campbell,* 616 F.2d 1151, 1152 (9th Cir.) (no breach of

duty by defense attorney who substantially complied with ABA Proposed Defense Function Standard 4-7.7), *cert. denied,* 447 U.S. 910, 100 S.Ct. 2998, 65 L.Ed.2d 861 (1980); *Lowery v. Cardwell,* 575 F.2d 727, 730-31 (9th Cir.1978) (bench trial; due process analysis); *id.* at 732 (Hufstedler, J., specially concurring) (effective assistance of counsel analysis); *United States ex rel. Wilcox v. Johnson,* 555 F.2d 115, 120-22 (3d Cir.1977) (due process analysis and informative discussion of effective assistance of counsel); *Butler v. United States,* 414 A.2d 844, 849-50 (D.C.1980) (banc) (due process analysis); *Johnson v. United States,* 404 A.2d 162, 163-64 (D.C.1979) (veracity or falsity of defendant's testimony must not be conjectural); *Thornton v. United States,* 357 A.2d 429, 433-36 (D.C.) (following ABA Proposed Defense Function Standards), *cert. denied,* 429 U.S. 1024, 97 S.Ct. 644, 50 L.Ed.2d 626 (1976); *Commonwealth v. Wolfe,* 301 Pa.Super. 187, 447 A.2d 305, 309-10 & n. 7 (1982); *In re Goodwin,* 279 S.C. 274, 305 S.E.2d 578, 579-80 (1983) (following ABA Proposed Defense Function Standards). *Compare* ABA Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function, Proposed Defense Function Standard 4-7.7 (2d ed. 1980) (ABA Proposed Defense Function Standard) (Appendix A), *with* ABA Model Rules of Professional Conduct 3.3 & comment (1983) (ABA Model Rules) (Appendix B). *See generally* M. Freedman, Lawyers' Ethics in an Adversary System (1975); Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law,* 44 Mo.L.Rev. 601 (1979); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System,* 29 Rutgers L.Rev. 332 (1976); Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's*

Conflicting Ethical Obligations to the Court and to His Client, 59 Den.L.J. 75 (1981); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 Mich.L.Rev. 1469 (1966); Wolfram, *Client Perjury,* 50 S.Cal.L.Rev. 809 (1977).

[2] Our discussion begins with the following observation: our analysis does not deal with the ethical problem inherent in appellant's claim. We are concerned only with the constitutional requirements of due process and effective assistance of counsel. As the ABA Model Rules 3.3 comment, appendix B, states, the Constitution prevails over rules of professional ethics, and a lawyer who does what the sixth and fourteenth amendments command cannot be charged with violating any precepts of professional ethics. This is a very controversial matter and we commend counsel for conscientiously attempting to address the problem of client perjury in a manner consistent with professional responsibility.

[3, 4] Appellant first argues that counsel improperly acted on the basis of mere suspicion that appellant would testify falsely. The reason why counsel believes that the defendant intends to testify falsely is an important threshold question because " '[w]here . . . the veracity or falsity of the defendant's testimony is conjectural, the ethical dilemma does not arise.' " *Butler v. United States,* 414 A.2d at 850, *citing Johnson v. United States,* 404 A.2d at 164. Both ABA Model Rule 3.3 and ABA Proposed Defense Function Standard 4-7.7 presuppose that defense counsel *knows* that the defendant's testimony will be false on the basis of either independent investigation or prior discussions with the defendant or both. Mere suspicion or inconsistent statements by the defendant alone are insufficient

to establish that the defendant's testimony would have been false. *See Butler v. United States,* 414 A.2d at 850-51 (inconsistent statements); *Johnson v. United States,* 404 A.2d at 164 (inconsistency between two proffered defenses); *Commonwealth v. Wolfe,* 447 A.2d at 310 n.7 (suspicion). Counsel must act if, but only if, he or she has "a firm factual basis" for believing that the defendant intends to testify falsely or has testified falsely. *See United States ex rel. Wilcox v. Johnson,* 555 F.2d at 122. It will be a rare case in which this factual requirement is met. Counsel must remember that they are not triers of fact, but advocates. In most cases a client's credibility will be a question for the jury.

[5-7] In the present case the state supreme court found that "counsel was convinced with good cause to believe [appellant's] proposed testimony would be deliberately untruthful," and that counsel had based this belief upon an independent investigation and prior discussions with appellant. 272 N.W.2d at 471. This factual determination is fairly supported by the record and is therefore presumptively correct. *See Sumner v. Mata,* 449 U.S. 539, 544, 101 S.Ct. 764, 767, 66 L.Ed.2d 722 (1980). For the purposes of our analysis, we presume that appellant would have testified falsely. We recognize, of course, that the criminal defendants' privilege to testify in their own defense does not include the right to commit perjury. *See Harris v. New York,* 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1 (1971). However, the fact that appellant would have committed perjury does not mean that appellant has waived his right to a fair trial, due process or effective assistance of counsel. *Cf. Lowery v. Cardwell,* 575 F.2d at 730 (examination of defendant ceased abrupt-

ly and was followed by counsel's in camera motion to withdraw and refusal to state the reason for the motion; only rational conclusion to be drawn by judge as fact-finder was that defendant had testified falsely; held denial of due process). The "remedy" for appellant's perjury is prosecution for perjury.

[8] Thus, in the present case defense counsel was confronted shortly before trial with appellant's intention to testify in his own defense in a manner that defense counsel had a firm factual basis for believing would be false. Counsel threatened appellant that he would withdraw from the case, advise the state court trial judge of appellant's intention, and testify against him as a rebuttal witness for the prosecution. Counsel's actions prevented appellant from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel. As noted by the court in *Lowery v. Cardwell*, 575 F.2d at 731, "[w]e are acutely aware of the anomaly presented when mistrial must result from counsel's bona fide efforts to avoid professional irresponsibility. We find no escape, however, from the conclusion that fundamental requisites of fair trial have been irretrievably lost."

As recently noted by the Supreme Court in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 2063, 2065, 80 L.Ed.2d 674 (1984) (citations omitted; emphasis added),

> The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. . . . Thus, a fair trial is one in which evidence subject

> to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.
>
> . . . The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.
>
> . . . .
>
> Representation of a criminal defendant entails certain basic duties. *Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.* From counsel's function as assistant to the defendant derive the overreaching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Thus, the fair and effective operation of the adversary system depends upon the attorney who must zealously ad-

vocate the defendant's cause to judge and jury for determination. Counsel's ability to serve as an effective advocate, in turn, depends upon the defendant's ability to disclose information fully and in confidence to counsel. "When an attorney unnecessarily discloses the confidences of [the] client, [the attorney] creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation." *United States ex rel. Wilcox v. Johnson,* 555 F.2d at 122.

[9] In the present case counsel's actions in threatening to withdraw, advise the state trial judge and testify against appellant if appellant testified falsely, impermissibly compromised appellant's right to effestive assistance of counsel. Despite counsel's legitimate ethical concerns, counsel's actions were inconsistent with the obligations of confidentiality and zealous advocacy. *See Lowery v. Cardwell,* 575 F.2d at 732 (Hufstedler, J., specially concurring). *See generally* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 Mich.L.Rev. at 1475-78. Counsel's actions, in particular the threat to testify against appellant, indicate that a conflict of interest had developed between counsel and appellant, even though this conflict was admittedly precipitated by appellant's intention to testify falsely. At this point counsel had become a potential adversary and ceased to serve as a zealous advocate of appellant's interests. "No matter how commendable may have been counsel's motives, [counsel's] interest in saving himself [or herself] from potential violation of the canons [or the ABA Model Rules of Professional Conduct] was adverse to [the] client, and the end product was [counsel's] abandonment of a diligent defense." *Lowery v.*

Cardwell, 575 F.2d at 732 (Hufstedler, J., specially concurring).

[10-12] Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony. We hold that criminal defendants have the constitutional right to testify which, although not specifically expressed in the Constitution or the Bill of Rights, is implicit in the fifth and fourteenth amendments' due process guarantee of a fair adversarial process and in the sixth amendment's guarantee of the right to meet and confront accusations, to be present and to present evidence and witnesses on one's behalf, including the right to present oneself as a witness. *See United States v. Bifield,* 702 F.2d 342, 349 (2d Cir.), *cert. denied,* — U.S. —, 103 S.Ct. 2095, 77 L.Ed. 2d 304 (1983); *Alicea v. Gagnon,* 675 F.2d 913, 923 (7th Cir.1982); *United States ex rel. Wilcox v. Johnson,* 555 F.2d at 118-19; *see also Wright v. Estelle,* 572 F.2d 1071, 1075-76 (5th Cir.) (Godbold, J., dissenting), *cert. denied,* 439 U.S. 1004, 99 S.Ct. 617, 58 L.Ed.2d 680 (1978). Counsel's actions improperly forced appellant in effect to choose between two constitutional rights, the right to testify in one's own defense and the right to effective assistance of counsel, and infringed both. *See United States ex rel. Wilcox v. Johnson,* 555 F.2d at 120-21.

The appropriate test for prejudice in ineffective assistance claims was clarified in *Strickland v. Washington,* 104 S.Ct. at 2068: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." However, the Court noted that "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance." *Id.* at 2067, *citing United States v. Cronic,* — U.S. —, 104 S.Ct. 2039, 2046-47 n. 25, 80 L.Ed.2d 657. The Court further noted that ineffective assistance of counsel claims that involved conflict of interest warranted "a similar, though more limited, presumption of prejudice. . . . Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.'" 104 S.Ct. at 2067, *citing Cuyler v. Sullivan,* 446 U.S. 335, 348, 350, 100 S.Ct. 1708, 1718, 1719, 64 L.Ed.2d 333 (1980) (footnote omitted).

[13] Although *Cuyler v. Sullivan* involved an allegation of conflict of interest on the basis of multiple representation, we think that the same limited presumption of prejudice should apply to the conflict of interest between counsel and client involved in this case. Conflicts of interest necessarily implicate breach of counsel's duty of loyalty, which is "perhaps the most basic of counsel's duties." *Strickland v. Washington,* 104 S.Ct. at 2067. Here the breach of loyalty arose from counsel's threat to testify against appellant. Such threats undermine the fundamental trust between lawyer and client that can exist only if the lawyer "can convince the client that full and confidential disclosure . . . will never result in prejudice to the client by any word or action of the lawyer." Freedman, *Professional Responsibility of the Criminal Defense Law-*

yer: The Three Hardest Questions, 64 Mich.L.Rev. at 1473. Thus, threats like the one here are presumptively prejudicial to the defense.

We recognize the difficulties created when the duty to render effective assistance, imposed by the sixth and fourteenth amendments, is not completely congruent with the relevant code of professional ethics. We wish to stress that our task is not at all to determine whether counsel behaved in an ethical fashion. That question is governed solely by the Iowa Code of Professional Responsibility, as it was in effect at the time of the trial in this case, and as it has been authoritatively interpreted by the Supreme Court of Iowa. The Supreme Court of Iowa is the last word on all questions of state law, and the Code of Professional Responsibility is a species of state law. It nevertheless remains our duty to determine what the sixth amendment requires. In doing so, we are at liberty to consider, purely as guidelines and not as governing rules, the views of authorities on legal ethics, including views set forth in various proposed standards and codes of professional conduct. In this connection, we note that counsel here fell short not only under the strict Freedman approach, but also under the ABA Proposed Defense Function Standards. Even the ABA Model Rules of Professional Conduct do not appear to sanction a threat by defense counsel actually to take the stand and to testify as a prosecution witness on rebuttal. Our holding is no broader than necessary to dispose of the perhaps unique fact situation presented here. In particular, we express no view on the sixth amendment implications of a lawyer's simply moving to withdraw, with or without informing the trial court of the reason. Surely a lawyer who actually

testified against his own client could not be said to be rendering effective assistance. The same is true, we think, of a lawyer who threatens to testify against his own client.

[14] Here, counsel went so far in his (at least initially) commendable zeal to avoid deceiving the court that he became an adversary to his own client. In this situation, we believe that appellant did not receive the effective assistance of counsel.

Accordingly, the judgment of the district court is rereversed and the case is remanded to the district court with directions to grant the petition for writ of habeas corpus if the state does not begin new trial proceedings within a period to be determined by the district court.

Appendix A

ABA Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function, Proposed Defense Function Standard 4-7.7 (2d ed. 1980), provides:

> (a) If the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true but the defendant insists on the right to trial, counsel must strongly discourage the defendant against taking the witness stand to testify perjuriously.
>
> (b) If, in advance of trial, the defendant insists that he or she will take the stand to testify prejuriously, the lawyer may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner, instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier of or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

Appendix B

ABA Model Rules of Professional Conduct 3.3 & comment (1983) provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
Comment:

. . . .

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to per-

suade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary

to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhops nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Model Rule 1.2(d), (e) provides:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Model Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> > (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1015

Appeal from the United States District Court for the Southern District of Iowa

Emmanuel Charles Whiteside,

Appellant,

v.

David Scurr, Warden,

Appellee.

Filed: December 24, 1984

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges.

ORDER

McMILLIAN, Circuit Judge.

The motion for rehearing en banc is denied. Contrary to the argument presented by the state in support of the motion for rehearing en banc, our opinion does not create a right to commit perjury. Our opinion expressly states that the criminal defendant's privilege to testify in his or her own defense does not include the right to commit perjury. Perjury is a most serious offense and anyone who commits perjury should be pun-

ished for it. Our holding is limited to the fact situation in the present case. We hold only that a lawyer who has a firm factual basis for believing that his or her client is about to commit perjury, because of confidential communications the client has made to the lawyer, may not disclose the content of those confidential communications to the trier of fact, in the present case the jury. The lawyer who discloses confidential communications or who threatens to do so has departed from the role of an advocate and has become an adversary to the interests of his or her client. Such a client has lost the effective assistance of counsel, a right to which even those defendants who may later be accused of perjury are entitled.

LAY, Chief Judge, concurring in the denial of a rehearing en banc.

I concur in the denial of a rehearing en banc, but write specially to address Judge Fagg's dissenting opinion. In characterizing the issue in this case as whether the insistence of defendant's counsel that the defendant testify truthfully denied the defendant effective assistance of counsel, Judge Fagg totally misreads the holding of *Whiteside v. Scurr,* No. 83-1015 (8th Cir. September 19, 1984). His dissent is certain to leave both lawyers

and laypersons confused as to the breadth of the decision in this case.[1]

The panel opinion in *Whiteside* does not hold that the defendant was denied his constitutional rights because counsel demanded he testify truthfully. A lawyer must always insist that his or her client testify with veracity. As the panel opinion recognizes, such insistence neither creates a conflict of interest nor renders counsel ineffective. To suggest otherwise, sets up a straw-man, easily knocked down.

Ethical standards allow a lawyer to seek withdrawal when a client insists on giving testimony the lawyer knows to be perjurious. *See* American Bar Association, *Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function,* Proposed Defense Function Standard 4-7.7 (2d ed. 1980). Counsel should not, however, advise the court of his or her reason for seeking withdrawal.[2] In this case, defendant's counsel

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[1]The Des Moines Sunday Register published a distortional article titled "Iowa Lawyers criticize ruling, say it encourages perjury by defendants" and describing the panel opinion as holding "that an Iowa man convicted of murder must be retried or set free because his attorney wouldn't let him commit perjury." Des Moines Sunday Register, Oct. 14, 1984, at 3B. Similar misinterpretation is demonstrated by the former Iowa Attorney General's characterization of the panel opinion as "outrageous," and the admonition of a Drake University Law School professor to "pay attention to the Code of Professional Responsibility for Lawyers' [sic]—and not be a party to perjury * * *." *Id.*

[2]I recognize that nonverbal acts may, in some circumstances, inform the court that the client is intending to give false testimony. In *Lowery v. Cardwell,* 575 F.2d 727 (9th Cir.

(Continued on next page)

threatened to take the stand and impeach his client. Such a threat is not only unethical, it creates a conflict of interest between the lawyer and the defendant rendering counsel ineffective in violation of defendant's sixth amendment rights.

This court's holding that a counsel's threat to testify against his or her client in a criminal case violates the defendant's constitutional rights does not lessen counsel's duty to avoid subornation of perjury. As the Ninth Circuit observed in *Lowery:*

> The problem presented is that which arises when defense counsel * * * forms the belief that his client's defense is based on false testimony. We start with the basic proposition that if, under these circumstances, counsel informs the fact finder of his belief he has, by that action, disabled the fact finder from judging the merits of the defendant's defense. Further, he has by his action openly placed himself in opposition to his client upon her defense. The consequences of such action on the part of counsel, in our judgment, are such as to deprive the defendant of a fair trial.

(Continued from previous page)

1978), for example, counsel abruptly ceased questioning his client, the defendant, after she falsely denied shooting a deceased man. Counsel requested a recess, and made a motion in chambers to withdraw, but refused to state why he sought withdrawal. The motion was denied, and counsel continued his representation of the defendant. The attorney, however, did not argue that the defendant had not shot the victim, instead he contended that the state's case was subject to reasonable doubt. The Ninth Circuit held that the attorney's acts "amounted to such an unequivocal announcement to the fact finder as to deprive appellant of due process." *Id.* at 730. Withdrawal before trial, or when feasible, without advising the trial judge of the particulars of the situation, normally will not constitute an "unequivocal announcement" depriving a defendant of his or her constitutional rights.

Lowery, 575 F.2d at 730. Judge Fagg's dissenting opinion broadens the holding in *Whiteside* far beyond its limits. That it is both unethical and a denial of effective assistance of counsel for an attorney to threaten to testify against the defendant client as to information given in confidence by the client is uncontestable. That a lawyer must serve as a guardian of truth in the judicial process is also without doubt. The panel opinion in *Whiteside* does no more than tie these two certainties together.

JOHN R. GIBSON, Circuit Judge, with whom ROSS, FAGG and BOWMAN, Circuit Judges, join, dissenting from denial of rehearing en banc.

The Court has granted habeas relief to a petitioner whose only claim of prejudice is that his counsel required him to testify truthfully. The starkness and incongruence of the court's position are demonstrated by the following excerpts, which outline its holding:

> [W]e presume that appellant would have testified falsely.
>
> • • • •
>
> • • • Counsel threatened appellant that he would withdraw from the case, advise the state court trial judge of appellant's intention, and testify against him as a rebuttal witness for the prosecution. Counsel's actions prevented appellant from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel.
>
> • • • •
>
> Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by con-

ditioning continued representation by counsel and confidentiality upon appellant's restricted testimony.

Whiteside v. Scurr, 744 F.2d 1323, 1328, 1329 (8th Cir. 1984).

The court then proceeds to presume prejudice and in my view this is its most critical error. In *Strickland v. Washington,* 104 S. Ct. 2052 (1984), the Supreme Court made clear that ineffective assistance claims must raise two components, deficient performance and prejudice. Failure to prove either element requires denial of relief. *Id.* at 2069-70. I join Judge Fagg in his views on the performance component but I write separately to underscore my concerns with the absence of prejudice, which is a sufficient ground to deny the writ.

It is true that *Strickland* describes a limited presumption where there is a conflict of interest. The court in its opinion recognizes the language of the *Strickland* test of prejudice but fails to apply it to the facts in this case. The court, quoting *Strickland,* states that prejudice must be presumed only if counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." 744 F.2d at 1330. A strong argument can be made that there is no actual conflict of interest. To say that there is a conflict requires that we recognize the right of Whiteside to testify falsely, while the Supreme Court has made plain that a criminal defendant has no right to commit perjury.

Assuming that there was a conflict, however, the record simply does not show that it adversely affected counsel's performance. The attorney's threat produced a single effect: it persuaded Whiteside to tell the truth

as a witness. The case was tried and Whiteside testified, although, as the court observes on numerous occasions, his testimony was restricted in the sense that he was prevented from testifying falsely. The record reveals that Whiteside testified that he thought Love had a gun, which was precisely what he told his lawyer he would testify to, before he told his lawyer that he intended to testify that he saw something metallic in Love's hand just before the stabbing. I cannot justify the court's presuming that Whiteside was prejudiced when he testified fully in his defense and was restricted only in the sense that he did not testify falsely. Whiteside has not suggested that any other prejudice resulted from the threats of his counsel. The record reveals no other action during or before the trial that in any way demonstrates that counsel's performance was adversely affected by an actual conflict of interest. *Strickland* makes clear that it does not announce a per se presumption of prejudice in conflict of interest situations. In actuality, the court does apply such a per se rule to presume prejudice in this case.

Although it may not be applicable, *Strickland* lays down another test if there is no conflict: prejudice arises only if "but for counsel's errors, the result of the proceeding would have been different." 104 S. Ct. at 2068. The facts in this case make it unlikely that lying on the stand would have changed the outcome in Whiteside's trial. As the Iowa Supreme Court observed:

> There were three other persons in the room. No one testified to having seen a gun. A search of the apartment shortly after Love's death did not disclose one. * * * [D]uring the argument Love told his girl friend to get his "piece"—meaning his gun. This refutes defendant's claim Love already had one.

State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978). This evidence both demonstrates the strength of the case against Whiteside and impeaches his proposed false testimony. Thus, we cannot conclude that the result of the trial would have been different. Whiteside has failed to demonstrate actual prejudice under the nonconflict standard.

The court makes much of the constraints on communication between lawyer and client because of counsel's threat. This concern is more theoretical than real, given that the threat occurred immediately before trial. Prior to this, there had been numerous conferences between lawyer and client, with the lawyer having full appreciation of the likely testimony from Whiteside. The fundamental trust between the lawyer and client was threatened more by Whiteside's decision to give perjured testimony, *after* a full and confidential disclosure of facts surrounding the case.

Strickland makes clear that the ultimate focus "must be on the fundamental fairness of the proceeding." 104 S. Ct. at 2069. Fundamental fairness cannot be stretched to encompass prejudice resulting from the absence of perjured testimony. *Strickland* also observes that a defendant is not entitled to the "luck of the lawless decisionmaker," *id.* at 2068, and its definition of prejudice cannot include an entitlement to receive the benefit of lawless or perjured testimony.

The court examines counsel's position primarily in terms of legal ethics. The Supreme Court of Iowa was more realistic in discussing not only the ethical considerations, but that a lawyer who knowingly uses perjured testi-

mony or who aids a client's criminal act may be subject to prosecution for suborning perjury. *Whiteside,* 272 N.W.2d at 471. The majority does not discuss the proper course for the lawyer in the position faced by Whiteside's counsel, which presents an extremely complex question. We should not attempt to resolve this issue in separate opinions. Consideration of counsel's dilemma is further reason for rehearing en banc, particularly in view of the conflicting academic discussions of this question. *See Whiteside,* 744 F.2d at 1327. It is sufficient here, however, simply to conclude that Whiteside has not been prejudiced by being required to testify truthfully. The court should rehear this case en banc and on full reconsideration should deny the writ.

FAGG, Circuit Judge, dissenting from denial of rehearing en banc, joined by ROSS, John R. GIBSON, and BOWMAN, Circuit Judges.

The panel opinion addresses an issue of significant constitutional dimension and of paramount concern to lawyers representing criminal defendants:

> Was Emmanuel Charles Whiteside denied effective assistance of counsel because his lawyer insisted that he testify truthfully in his own behalf?

I find it difficult to believe that a panel of this court would hold that a lawyer who makes use of a private dialogue with his client to dissuade the client from testifying falsely is burdened by a conflict of interest, is disloyal, is less than zealous, and is guilty of compromising the client's right to testify in his own defense. In arriving at this result, the panel has lost sight of the fact that

"the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington,* 104 S. Ct. 2052, 2069 (1984). Contrary to the panel's view, I have no difficulty in taking the position that a lawyer who insists upon truthful testimony is beyond reproach and his conduct is professionally reasonable. To hold otherwise is to foster "a breakdown in the adversarial process that our system counts on to produce just results." *Id.*

Whiteside has one fundamental complaint about his lawyer's performance: the lawyer insisted that Whiteside testify truthfully (that Whiteside thought his victim had a gun) while Whiteside wished to testify falsely (that he saw a gun in the victim's hand). Indeed, the panel acknowledges that Whiteside "would have testified falsely," and that the lawyer's actions "prevented [Whiteside] from testifying falsely." *Whiteside v. Scurr,* 744 F.2d 1323, 1328 (8th Cir. 1984). Nevertheless, the panel concludes "that counsel's action deprived [Whiteside] of due process and effective assistance of counsel." *Id.*

To prevent his client from committing perjury, Whiteside's lawyer told him "that if he insisted [on committing perjury], then he (counsel) would move to withdraw, advise the state trial judge that the testimony was perjurious and testify against him." *Id.* at 1326. Although this strongly worded admonition may have resulted in some degree of antagonism between Whiteside and his lawyer, I simply do not believe that a lawyer who, in the privacy of the lawyer-client relationship, admonishes his client to testify truthfully creates an actual conflict of interest. This conclusion is particularly compelling since a client has no constitutionally protected interest in testi-

fying falsely. Furthermore, even if the actions of Whiteside's attorney created a conflict, the panel points to no evidence which suggests that the lawyer's dialogue adversely affected either his performance or the underlying lawyer-client relationship. *Strickland,* 104 S. Ct. at 2067.

In fact, it appears that Whiteside received the zealous, faithful representation of a lawyer who did his best to prepare and present his client's defense. Further, the lawyer did nothing to prevent Whiteside from testifying, but rather allowed Whiteside to testify fully and only insisted that his testimony be truthful. Since Whiteside's testimony was truthful and uninhibited, it is difficult to understand how the panel concludes that the lawyer's actions "compromised Whiteside's right to testify in his own defense," *Whiteside,* 744 F.2d at 1329, particularly in light of the panel's recognition that "criminal defendants' privilege to testify in their own defense does not include the right to commit perjury," *id.* at 1328 (citing *Harris v. New York,* 401 U.S. 222, 225 (1971)). In my view, the panel's holding is at odds with the principle espoused in *Harris.*

The lawyer's reaction to Whiteside's announced intention to give false testimony was undeniably strident. In my opinion, however, the panel analyzed the lawyer's strongly worded admonition from a theoretical viewpoint without taking into account what actually happened after the lawyer told Whiteside that he would not tolerate perjurious testimony. Further, the panel overlooked the practicalities of effective communication between the lawyer and his client. The lawyer's choice of words should not disturb us. Rather, what is important is that the lawyer

effectively communicate with his client on a level the client can understand. In this case he did. As far as I can tell from reading the panel opinion and the trial transcript, the lawyer's threats had a singular impact on the trial—Whiteside did not tell a deliberate lie when he appeared on the witness stand.

I cannot accept the panel's conclusion that a lawyer, otherwise diligent and zealous in his representation, commits an "unprofessional error" solely because he insists that his client refrain from doing something the client has no constitutional right to do—commit perjury. In *Strickland,* the Supreme Court observed that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 104 S. Ct. at 2064. The panel opinion disregards the *Strickland* benchmark and totally ignores the lawyer's duty as an officer of the court to protect the integrity of our Nation's courts. False testimony on a crucial factual issue is not "evidence subject to adversarial testing" within the framework of a fair trial. *Id.* at 2063.

In affirming Whiteside's state court conviction, the Iowa Supreme Court stated:

> A defendant is entitled to present his defense and to an opportunity to testify fully and freely concerning any defensive matter. However, he has no right to commit perjury nor is an attorney permitted—much less required—to aid in such a purpose. Counsel owes a client charged with a crime honest, loyal, and faithful representation. However, this duty extends only to the use of fair and honorable means. A lawyer may never assist in the perpetration of a crime or countenance any other dishonest act.

State v. Whiteside, 272 N.W.2d 468, 470 (Iowa 1978). This pronouncement has a virtue. Criminal defense lawyers are told where they stand and assured that they can proceed with confidence to purge the deliberate lie from the trial record. This court should not shirk its obligation to provide the same affirmative guidance.

I find it hard to believe that a lawyer who nips perjury in the bud is "ineffective" within the context of the constitutional fabric. Rather, I believe the proper view is the one taken by the Seventh Circuit in the case of *United States v. Curtis,* 742 F.2d 1070 (7th Cir. 1984), in which that court concluded that a lawyer's refusal to allow his client to take the witness stand and commit perjury did not constitute ineffective assistance. *Id.* at 1076.

Hence, I note with dismay that the court has denied the petition for rehearing en banc.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

STATE of Iowa, Appellee,

v.

Emanuel Charles R. WHITESIDE, Appellant.

No. 61091.

Supreme Court of Iowa.

Dec. 20, 1978.

Considered by REYNOLDSON, C.J., and LeGRAND, McCORMICK, McGIVERIN and LARSON, JJ.

LeGRAND, Justice.

A jury convicted defendant of murder in the second degree for the stabbing death of Calvin Love. Defendant was sentenced to serve a term of forty years in the penitentiary under the provisions of § 690.3, The Code, 1977. He appeals from that judgment and we affirm.

The incident resulting in Calvin Love's death occurred following a controversy between defendant and the decedent over narcotics. The issues raised do not require a discussion of the facts. We refer to them when necessary in our consideration of this appeal.

Defendant raises three issues. One deals with instructions, one deals with the admission of evidence, and the third deals with the assertion that defendant was denied a fair trial because his counsel prevented him from presenting his defense in a proper manner.

[1] I. We deal with the last matter first. Defendant claims his victim had a gun and that he acted to protect himself from an assault by Love with that deadly weapon.

He says his attorney (not the one who now represents him) would not permit him to testify to that fact and threatened, if he persisted in doing so, to withdraw from the case and to advise the trial judge that this testimony was perjurious.

Defendant argues counsel prevented him from testifying "truthfully" to what would have been a good defense. The state says counsel's conduct was designed to avoid, not truthful, but untruthful testimony.

Throughout the early stages of this case, while defendant was awaiting trial, he maintained he "thought" Love had a gun but did not see one. Shortly before trial, defendant told his attorney he intended to say he *did* see a gun because without such testimony he was "dead." This precipitated the disagreement between defendant and his lawyer over defendant's testimony.

Defendant first raised this issue in a motion for new trial. An evidentiary hearing was held at which both defendant and the attorney, Gary Robinson, testified. So did Donna L. Paulsen, who was associated with Robinson in representing defendant. The trial court overruled the motion, and the evidence to support that conclusion is convincing.

[2,3] A defendant is entitled to present his defense and to an opportunity to testify fully and freely concerning any defensive matter. However, he has no right to commit perjury nor is an attorney permitted—much less required—to aid in such a purpose. Counsel owes a client charged with a crime honest, loyal, and faithful representation. However, this duty extends only to the use of fair and honorable means. A lawyer may never assist in

the perpetration of a crime or countenance any other dishonest act.

[4] A lawyer not only has an obligation to his client; he must also recognize his duty as an officer of the court. His oath as a member of the bar requires him to employ "such means only as are consistent with truth." By that oath he undertakes not to "mislead the judges by any artifice or false statement of fact or law."

[5] It is true that a lawyer's task is not to determine guilt or innocence, but only to present evidence so that others—either court or jury—can do so. A lawyer should not, therefore, decide what is true and what is not unless there is compelling support for his conclusion. *See U. S. ex rel. Wilcox v. Johnson,* 555 F.2d 115, 120 (3rd Cir. 1977). In the present case, counsel was convinced with good cause to believe defendant's proposed testimony would be deliberately untruthful. All the other evidence belied defendant's tardy claim. There were three other persons in the room. No one testified to having seen a gun. A search of the apartment shortly after Love's death did not disclose one. Even defendant says that during the argument Love told his girl friend to get his "piece"—meaning his gun. This refutes defendant's claim Love already had one. These circumstances, plus defendant's own statement (in the face of his contrary earlier version) that he *had* to testify that Love had a gun if he hoped to be acquitted, lends strong support to counsel's belief defendant did not see a gun and that he nevertheless intended to say that he did. Counsel properly refused to be a partner in such a dishonest and deceitful scheme. *See State v. Henderson,* 205 Kan. 231, 468 P.2d 136, 140 (1970) and authorities there cited.

There are several specific provisions in the Iowa Code of Professional Responsibility for Lawyers which vindicate counsel's action. Canon 4 obligates a lawyer to preserve the confidences and secrets of his client with certain exceptions including this one:

"A lawyer may reveal:

(1) • • •

(2) • • •

(3) The intention of his client to commit a crime and the information necessary to prevent the crime." (see DR 4-101(C), Code of Professional Responsibility for Lawyers.)

Canon 7 provides:

"A lawyer should represent a client zealously *within the bounds of the law.*" (Emphasis added.)

[6] A lawyer who knowingly uses perjured testimony or false evidence or who aids a client to commit a criminal act is himself subject to disciplinary action, not to mention the possibility of his own prosecution for suborning perjury. § 721.2, The Code, (now § 720.3, Supplement to the Code, 1977). *See also* EC7-5, EC7-26, and DR 7-102(A)(4), Code of Professional Responsibility for Lawyers.

We commend both Mr. Robinson and Ms. Paulsen for the high ethical manner in which this matter was handled. Defendant is not entitled to relief on his first claim of error.

II. Defendant raises a number of objections to the instructions, none of which have merit. We dispose of each briefly.

[7] He argues the instruction on premeditation is bad because it refers to the fact such premeditation need not exist for "any particular time before the act." Defendant insists this should have said "particular period of time before the act," instead of just "particular time before the act." We see no difference in the court's language and in that the defendant thinks is better.

[8] Instruction 12, defendant says, is objectionable because it permitted the jury to infer that he intended the probable and natural consequences of his act. This, he claims, shifts the burden of proof on an essential element of the crime to him. This, too, is without merit. The instruction as given follows closely Instruction 215 of the Iowa State Bar Association Uniform Jury Instructions. We disagree with these instructions reluctantly. *Ness v. H. M. Iltis Lumber Co.*, 256 Iowa 588, 593-94, 128 N. W. 2d 237, 240 (1964). We believe this instruction correctly states the law.

[9, 10] As to Instruction 13, defendant asserts this incorrectly defines manslaughter because it refers to "provocation" and "the heat of passion." He says manslaughter may be committed without such circumstances being shown. Indeed it might, but not under this record. Instructions should be patterned to meet the evidence. *Baker v. Wolfe*, 164 N.W.2d 835, 839 (Iowa 1969); *Gibbs v. Wilmeth*, 261 Iowa 1015, 1022, 157 N.W.2d 93, 97 (1968). The trial court's instruction on manslaughter was complete and correct under the evidence in this case. Perhaps an even better reason for denying relief on this ground is that the instruction given is in all material respects the same as that which defendant himself requested.

[11] Defendant says the instruction allowing the jury to infer malice from the use of a deadly weapon shifts to him an impermissible burden of proof, requiring him to rebut the inference. Once more defendant's contention is baseless. The use of a deadly weapon is a circumstance bearing on the presence of malice. The use of such a weapon may itself give rise to an inference, which the jury is free to accept or reject, that defendant acted with malice.

These issues concerning deliberation, premeditation, malice, and the inference arising from the use of a deadly weapon have all been resolved against defendant's present argument in *State v. Frazer,* 267 N.W.2d 34, 38-39 (Iowa 1978); *State v. Smith,* 240 N.W.2d 693, 695 (Iowa 1976); and *State v. Lass,* 228 N.W.2d 758, 766-67 (Iowa 1975).

Defendant also says the instruction on self-defense did not correctly inform the jury concerning his duty to retreat. We find no merit in this complaint.

In summary, we hold the instructions fully and fairly presented the issues to the jury, and we find no reversible error in them.

[12] III. Defendant's last assignment of error concerns the admission of a medical report. The only objection at trial was on the basis of materiality and hearsay. On appeal a new ground was asserted—lack of foundation. We generally refuse to consider matters raised for the first time on appeal. We follow that rule here. *See State v. Willis,* 218 N.W.2d 921, 923 (Iowa 1974).

IV. We find no reversible error and the judgment is affirmed.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 81-246-C

EMMANUEL CHARLES WHITESIDE,

Petitioner,

vs.

DAVID SCURR, Warden,

Respondent.

ORDER

Filed December 7, 1982

In an Order dated September 22, 1982, the Court asked the parties to indicate whether they would withdraw their motions for summary judgment and submit the merits of the above-captioned habeas corpus action on the record made in the state court proceedings. Both parties agreed to do so. The Court has received all of the state court transcripts and is now prepared to rule on the merits of the petition.[1] The facts stated in the September 22 Order need not be repeated here.

Petitioner first raised the issues which form the basis of this habeas corpus action by way of a supplemental motion for a new trial in the state trial court where he was convicted. After a hearing at which both petitioner and his former defense attorneys testified, the trial court

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1. In its September 22 Order, the Court also raised a question concerning exhaustion. The parties' responses have persuaded the Court that there is no exhaustion problem.

denied the motion. In so doing, the trial judge noted that the testimony of petitioner conflicted with that of his defense attorneys in certain respects, and he concluded: "I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson [the defense attorneys]." An examination of the testimony of Paulsen and Robinson makes it clear that the foregoing statement constitutes a finding by the trial judge that petitioner would have perjured himself if he had testified at trial that he actually saw a gun in his victim's hand. This factual finding of the state court must be presumed correct in these federal proceedings unless the state court's determination is not fairly supported by the record. 28 U.S.C. § 2254(d) (8).[2]

This Court finds that the state court's determination *is* fairly supported by the record of the hearing on the supplemental motion for new trial; therefore, the burden is on petitioner to establish by convincing evidence that the state court's factual determination was erroneous. § 2254(d); *Sumner v. Mata,* 449 U.S. 539 (1981). As the parties have agreed to submit this case on the record made in the state court proceedings, the Court must look to that record to determine whether petitioner's burden is met. Having reviewed that record, the Court concludes that it has not been established by convincing evidence that the trial court's factual determination was erroneous. Therefore, this Court adheres to the state court's finding that the testimony petitioner was prevented from giving would have been perjured.

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2. It does not appear that any of the exceptions enumerated in § 2254(d) (1)-(7) are applicable here.

Given this factual determination, it necessarily follows that petitioner is not entitled to habeas relief. Certainly, there is no constitutional right to perjure oneself, and it cannot be said that petitioner was denied a fair trial or the right to effective assistance of counsel simply because his defense attorneys prevented him from testifying falsely.

IT IS THEREFORE ORDERED that petitioner's application for writ of habeas corpus be and it hereby is denied.

Signed this 7 day of December, 1982.

/s/ W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

APPENDIX E

No. A-512

DAVID SCURR, WARDEN,

Petitioner,

v.

EMMANUEL CHARLES WHITESIDE

ORDER

UPON FURTHER CONSIDERATION of the application of counsel for the petitioner and the response filed thereto,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Eighth Circuit, case No. 83-1015, be, and the same is hereby, further stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue in effect pending the sending down of the judgment of this Court.

IT IS FURTHER ORDERED that the request by counsel for respondent for release on bail is denied.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of January, 1985.

A true copy ALEXANDER L. STEVAS

Test:

Clerk of the Supreme Court of the United States
By Francis J. Carson

Chief Deputy

No. A-365

DAVID SCURR, WARDEN,

Petitioner,

v.

EMMANUEL CHARLES WHITESIDE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 16, 1985.

/s/ Harry A. Blackmun

Associate Justice of the Supreme Court of the United States

Dated this 13th day of November, 1984.

APPENDIX F

PORTIONS OF APPENDIX BEFORE THE IOWA SUPREME COURT

APPLICATION FOR PERMISSION TO WITHDRAW AS ATTORNEYS FOR DEFENDANT

COMES NOW, Thomas M. Horan and Timothy S. White, the Court appointed attorneys for the Defendant, Charles R. Whiteside in the above-referenced case and respectfully request that the Court allow them to withdraw as attorneys for the Defendant for the following reasons:

1. That the Defendant, Charles R. Whiteside has informed the Court that he wishes to have a different attorney appointed to represent him in the above-referenced case.

WHEREFORE, Thomas M. Horan and Timothy S. White respectfully request that the Court enter an Order appointing a new attorney for the Defendant, Charles R. Whiteside to assist the said Defendant in the preparation of his defense in the above-referenced case.

HEARING ON DEFENDANT'S REQUEST FOR APPOINTMENT OF ATTORNEY THOMAS KOEHLER

* * *

(Sup. Ct. App. 42) The Court: Well, we have two problems: first, a conflict between Mr. Platt and Mr. Koehler possibly arising out of the representation of two men involved in the charges arising out of the same set of facts. Now, I am not going to appoint Mr. Koehler if

there is a possibility of their being a conflict for the simple reason I've learned from long experience that you get into one of these and defendants start carving one another up and then an attorney has to withdraw. The Court must permit the withdrawal if there is a conflict, and so the Court has incurred on behalf of the taxpayers of Linn County substantial fees, and you have to appoint somebody else to do it. So I'm not going to appoint if there is a conflict of interest here; and, Mr. Whiteside, I'm not going to permit Mr. Koehler to represent one of the defendants and Mr. Platt to represent the other.

Mr. Koehler, have you discussed this with Mr. Platt, or what is your position on it?

(Sup. Ct. App. 43) Mr. Koehler: Yes, Your Honor, I have discussed this with Mr. Platt and I believe he does intend to represent Mr. Doolin in the event that Mr. Doolin is indicted by the grand jury, so there is a potential conflict.

The Court: Well, one of you is going to have to back off. I don't know which one. I don't care which one. But I don't want this thing of your getting in here and Mr. Platt's getting in here and then a conflict developing and then I find that I have to pay one of you gentlemen for substantial time which has, in effect, been wasted.

Mr. Koehler: I understand, Your Honor.

The Court: So I don't know how we resolve this. That's one thing—except by conference between you and Mr. Platt and Mr. Whiteside and Mr. Doolin. One of you or both of you can be in here, but you are not going to be representing different clients. I think you understand that. I think you appreciate that.

Mr. Koehler: I appreciate that, and I would state (Sup. Ct. App. 44) for the record that Mr. Platt, I believe, has worked on Mr. Doolin's. So-to-speak, he's in there first.

The Court: All right. Now, Mr. Whiteside, I've tried to explain to you the time before why I wouldn't do this. I had a case in this court about a year ago where two defendants had the same attorney and they were—that was what they wanted until we got right down to the nitty-gritty of the thing and then one of the defendants decided that the other one had led him into it and that it was the other guy's fault that he got involved, and that was right at the time of sentencing and he was trying to push that kind of a pitch to me—which may have been legitimate—but here was the attorney caught between these two people representing both of them. Now that won't do and I had to let the attorney withdraw from one of them and we had a substantial amount to pay because that attorney had devoted a substantial amount of time to both cases.

Now, that I can't let occur here so both you and Mr. Doolin are not going to be able to have Mr. Koehler and Mr. Platt.

(Sup. Ct. App. 45) Now, let me get to the second thing. Mr. Horan and Mr. White, how much time have you put in on this case to date?

Mr. Horan: Well, we've been present before this Court on three occasions. I have visited Mr. Whiteside at the jail on at least two occasions. Mr. White and I have discussed the case with Mr. Whiteside before and after these hearings at the courthouse here. There has been no depositions taken. I filed a Motion to Produce Evidence and a Motion to attempt to set up some depositions.

The Court: Can you give me a very rough idea of what your services and Mr. White's services would run to this date?

Mr. White: If the Court please.

The Court: Very roughly.

Mr. Horan: We would say ten or fifteen hours at the most.

The Court: All right, thank you.

Now, Mr. Whiteside, do you understand the situation?

The Defendant: Yes, sir.

(Sup. Ct. App. 46) The Court: Do you have some questions you want to ask me or Mr. Koehler or Mr. White or Mr. Horan? Now, anything you ask me you'll have to ask me on the record here, but if you want to talk with Mr. Koehler or Mr. White or Mr. Horan, all of them off the record, I'll permit you to do so; that is, talk to them privately.

The Defendant: I'd like to talk to Mr. Koehler first.

The Court: All right.

The Defendant: Off the record.

The Court: Yes, you may do so.

Mr. Blome, can you take them down to where Sandy is now holding fort? It's the court reporter's room, about the third one down the hall. You go down there and visit

with Mr. Koehler. Don't go far away, Harold or Mr. White.

(short recess was taken.)

The Court: Show that the defendant and all four attorneys return to the courtroom, the defendant having conferred with Mr. Koehler in private as per his request.

All right, now what's the situation, gentlemen?

(Sup. Ct. App. 47) Mr. Koehler: Well, Your Honor, I'll speak first. Mr. Whiteside did indicate that he wanted to talk to me. We did, in fact, go back to a private office here, and I again went over with him this idea of a potential conflict, a very potential conflict, and he still insists that he can't see a conflict, even a potential conflict arising. Now, is that correct, Mr. Whiteside?

The Defendant: Yes, sir.

Mr. Koehler: Even though we have tried to show him where it could happen and even given him examples of where it could happen, Mr. Whiteside still insists that there is no conflict and can be no conflict between Doolin and himself and Doolin's counsel and his counsel. That's about all we accomplished.

The Court: The Application for Withdrawal is denied. The Application for Appointment of Attorney is denied.

* * * *

(Sup. Ct. App. 48) Mr. White: I understand. Now, the problem, Your Honor, is this: Subsequent to this visit Mr. Whiteside now comes into court and says — meets me before the last hearing in the hallway and says,

"Mr. White, I don't want you as counsel. I don't want you or Mr. Horan as counsel under any circumstances. I want Mr. Koehler and I'm through with you people whatsoever," and I said now — I sat down with Mr. Whiteside and I explained to him that there was a potential conflict of interest; that we, in fact, had worked on this case; that we, in fact, had had experience handling the defense of murder cases. He reiterated time and again that he did not want us under any circumstances. His relatives then interjected themselves and they said they didn't want us under any circumstances.

Now, it seems to me under this whole frame of reference the problem that we have is this: We have a client who does not want us as lawyers, we are lawyers who don't want him as a client, and if we proceed in this matter, I can see under the grave circumstances (Sup. Ct. App. 49) that are involved, without getting into the facts, that if this man is convicted, he will then — the first thing that he will do is hire other counsel and he'll protest this Court's action as far as holding us in here against our will and against his will and we will all be in Federal Court under an inadequate of counsel allegation.

• • • •

The Court: All of the statements — That is all. All of the statements have completely ignored the taxpayers of Linn County and I'll bet you that the taxpayers of Linn County are tired of being ignored.

Mr. Whiteside and anyone else can select his own attorney when he is paying his own way, but Mr. Whiteside is not paying his own way.

Now, I will extend the time for the defendant to move, plead, or demur for a couple of more days. I will withhold my ruling on your Application to Withdraw then. I will retract my former statement and will withhold my ruling on that. And, Mr. Koehler, I would suggest that (Sup. Ct. App. 50) you talk with Mr. Whiteside then and see if there is some attorney whom Mr. Whiteside will accept, with whom you and Mr. Platt can work, if that is indicated in this case, and if there is somebody that Mr. Whiteside will accept other than you, perhaps I will permit the withdrawal of Mr. Horan and Mr. White and appoint somebody that's acceptable to Mr. Whiteside. I will not change my mind about appointing you to represent Mr. Whiteside while Mr. Platt is representing Mr. Doolin, and that is fine as far as I'm concerned.

(Sup. Ct. App. 51) PROCEEDINGS

(March 3, 1977, at 9:20 a.m.)

The Court: This is Cause No. CRF 3199-0277, The State of Iowa against Emanuel Charles R. Whiteside, Defendant.

This is the time for the defendant to move, plead, or demur, and he appears personally, and the State of Iowa is represented by Assistant Linn County Attorney, Harold Denton.

Now, I want the record to show that for almost the past hour I have been trying to contact an attorney. I have been trying to contact different attorneys who might be acceptable to Mr. Whiteside in this matter, the attor-

neys available being limited by conflicts of interest, and now I have contacted Gary F. Robinson.

Mr. Robinson: Gary L., Your Honor.

The Court: Gary L. Robinson, who is present in the courtroom. Mr. Robinson has conferred with Thomas L. Koehler, who was Mr. Whiteside's original request here, and Mr. Koehler informs the Court — and I guess he's informed Mr. Whiteside — that he can work in harmony and effectively with Mr. Robinson so long as there is no conflict between the interests of Mr. Whiteside and the interests of Mr. Doolin, who is represented by an associate of Mr. Koehler. And so I suppose you (Sup. Ct. App. 52) gentlemen, Mr. Robinson, Mr. Koehler, and Mr. Platt, will undoubtedly be cooperating on this case and that's why I want to make sure that it's someone that Mr. Koehler and Mr. Platt can work with, and they say they can work with you and will be happy to work with you.

Now, Mr. Whiteside has also had an opportunity to discuss this appointment with Mr. Koehler and with Mr. Robinson. And, Mr. Whiteside, now I ask you if I appoint Gary L. Robinson as your attorney in this matter is that going to be satisfactory to you?

The Defendant: Yes, sir.

The Court: Now, you understand that your chances of getting another change of attorneys are about zero? You understand that?

PORTIONS OF DEFENDANT WHITESIDE'S TRIAL TESTIMONY

(Sup. Ct. App. 65) A. It was — we was getting some glare from the outside like, from the window, a street light or something to that effect.

Q. You were able to make out shapes and—

A. Definitely, yes.

Q. Can you relate to the Court and to the ladies and gentlemen of the jury what happened next?

A. While I was standing there, Derrick was talking to Calvin Love, and Derrick asked Calvin, he say, "Why don't you give me some of the marijuana back? We can smoke it here. Give me part of it, anything." It was getting into a conversation about the marijuana. So Calvin seemed to have got, you know, got angry or something about it. So I didn't want any conflict to start. I say, "Well, just give us part of it. We'll sit right here and smoke it." So at that time he seemed to get more frustrated, got angry, and he told his girl friend, who was sitting across the room, he said, "Give me my piece," and I took that very close; it scared me. And I kind of stepped back, you know, and I thought for sure that he had a weapon.

Q. What happened after he said, "Get me my piece"?

A. When he said, "Give me my piece," Calvin stuck his hand under a pillow—

Q. What happened after that?

A. And at this time he just encountered me.

Q. What do you mean by "encountered"?

(Sup. Ct. App. 66) A. What do I mean by encounter?

Q. Yes.

A. I mean that he attacked me.

Q. He came off the bed at you?

A. That is correct.

Q. Were you still armed at this time?

A. Yes, sir, I was.

Q. And what happened?

A. When Calvin — when Calvin attacked me, I didn't see — there was no way for me to move. And Doolin was sitting on the bed like this. And I noticed — I just knew this man had a gun or something, and I couldn't get by, and he was already after me like this. So I kind of threw up my hand like this, and I kind'a pushed to get him back off me. The thing happened so fast. I actually — I don't know what happened, can't recall anything of what happened.

Q. But you did stab him, didn't you?

A. Yes, I did cut him.

Q. And this took place after he made the reference to getting his piece?

A. That is correct.

Q. Did you think that Calvin had a gun?

A. Most definitely I thought that.

Q. Why did you think that?

A. Because of Calvin's reputation, his brother's reputation, (Sup. Ct. App. 67) because of the prior conversation that Calvin and I had, I didn't have no other choice but to think he had a gun. And when he told his girl friend to give him his piece, I couldn't retreat. I couldn't do anything.

Q. What happened after the altercation between you and Calvin?

A. Everybody started moving, you know. And I'm frightened; I'm scared myself. And this girl say, "You want — you want your marijuana?" And I said, "Yes, give me my half." And she gave me my half and we left.

Q. Did you threaten that girl at any time?

A. No, sir, I did not.

Q. Did you say you were going to kill her?

A. No, sir, I did not.

Q. She's testified, and you heard her testify here in open court that you said you were going to kill her; is that testimony correct?

A. That testimony is false.

Q. Then the three of you left Calvin's apartment?

A. That is correct.

Q. What did you do with the knife?

A. When I was leaving out of Calvin's apartment, everybody started running. So did I. I was scared. I wanted to catch up with somebody so I could talk to somebody about what happened. I didn't know if I hurt Cal-

vin or what. I said — one thing that came to my mind, "Throw that knife * * *

PORTIONS OF DEFENDANT WHITESIDE'S TESTIMONY AT HEARING ON SUPPLEMENTAL MOTION FOR NEW TRIAL

(Sup. Ct. App. 68) Mr. George: I would call Mr. Whiteside to the stand, Your Honor.

EMANUEL CHARLES R. WHITESIDE,

the defendant, called as a witness in his own behalf, being duly sworn by the Court, testified as follows:

Direct Examination

By Mr. George:

Q. Charles, would you state your full name.

A. Emanuel Charles Ray Whiteside.

Q. And are you defendant in this matter before the Court today, cause No. CRF 3199?

A. Yes, sir.

Q. What's your age?

A. Twenty-seven.

Q. Your education?

A. Twelve years general.

Q. High school diploma?

A. Yes, sir.

Q. What kind of work experience have you had?

A. Teacher's aide and Merchants National Bank and plant labor.

Q. Have you spent any time in the penitentiary or reformatory?

A. Yes, I have.

Q. And how much time have you spent there?

A. Approximately three years.

Q. Okay. Were you tried earlier this year in regard — regarding (Sup. Ct. App. 69) the death of Calvin Love?

A. Yes, sir.

Q. And found guilty at trial?

A. Correct.

Q. On second degree murder?

A. Yes, that's right.

Q. Who was your attorney at trial?

A. Donna Paulsen and Gary Robinson.

Q. Were they the first attorneys appointed for you in that case?

A. No.

Q. Were they court-appointed?

A. Yes.

Q. Who were your first attorneys?

A. Horan and White.

Q. And why did they not represent you at trial?

A. I wasn't satisfied with them so I asked for a new attorney to be appointed to the case.

Q. Why weren't you satisfied?

A. Well, I don't have any reason why I wasn't satisfied. At the time I just didn't want Horan and White because at — from my knowledge, they used to be D.A. and I didn't feel comfortable with having them at all.

Q. They were associated with the attorney — or the

A. Correct.

Q —the County Attorney's office?

(Sup. Ct. App. 70) A. Yes.

Q. Were they associated at the time they were appointed to represent you?

A. Not to my knowledge.

Q. How did you come to have Mr. Robinson and Ms. Paulsen represent you?

A. Through Tom Koehler.

Q. And how did that occur?

A. I went over for — have an additional attorney appointed and asked for Tom Koehler. So he wasn't available at the time. So he recommended Gary Robinson to the case.

Q. And at the time that he made that recommendation, were both he and Mr. Robinson present?

A. Yes, they was.

Q. Was that in open court?

A. Yes.

Q. Who was your choice for an attorney in this matter?

A. Tom Koehler was my choice.

Q. Did you discuss the matter of the appointment of Mr. Robinson to represent you, with the Court?

A. Did I discuss the matter with the Court? Did I want an Attorney Gary Robinson to represent me?

Q. Correct.

A. Yes, I did. During that time, yes.

Q. At that time was it your understanding that Mr. Robinson (Sup. Ct. App. 71) would represent you at trial?

A. Yes. With my understanding also was he going to take the case on a part-time basis and Koehler was going to take over from there.

Q. And Koehler was going to take over from there?

A. Yes, this is my understanding.

Q. Do you recall exactly what was said to lead you to believe that that was what was going to happen?

A. No, because Attorney Tom Koehler was talking to me about it, and he say like, "I will take the case but Attorney Gary Robinson is going to lead it on."

Q. Was Mr. Koehler involved in something else at that time?

A. Correct.

Q. Do you know what?

A. No, I do not.

Q. Did you trust Mr. Koehler's judgment in the matter?

A. Yes, I did.

Q. When was your first contact with Mr. Robinson?

A. Humm. I'd say about a few days later after I met Gary — I met him first and I met Donna. I think Gary brought her over to the County Jail for me to meet her, if I'm correct. I think that's the way it was.

Q. Okay. When did you meet Gary Robinson?

A. I met him here at the courthouse over here at the courtroom.

Q. Do you recall when that was?

(Sup. Ct. App. 72) A. No, I can't.

Q. Can you tell me in relation to February 8 when that was?

A. I'd like for you to repeat that question so I can understand it very clearly.

Q. Okay. It's alleged in the County Attorney's True Information that the crime that you were tried for occurred on February 8, 1977.

A. Um-humm.

Q. In relation to that date, when did you first meet Mr. Robinson?

A. I can't recall.

Mr. Denton: Your Honor, if it would help things, perhaps we could just stipulate to that, because I'm sure

it's a matter of record as to the date Mr. Robinson was appointed. I'm sure it's a matter of record in the court file, if that would help things, because I certainly don't remember things—

The Court: Well, the record shows that on March 1 there was an Application For Appointment Of Attorney signed by Mr. Whiteside, apparently, asking the Court to allow Mr. Horan and Mr. White to withdraw and appoint Thomas Koehler. Then on that same date, Mr. Horan and Mr. White filed their Application For Permission To Withdraw, and on that same date — and that's March 1 of 1977 — in an Order signed by Judge Hyland, it's reflected that the defendant appeared with Mr. Horan and Mr. White. Mr. Denton was present representing the State, and Mr. Koehler was also present. It states, "For reasons shown of (Sup. Ct. App. 73) record, defendant's Application For Appointment of Thomas L. Koehler as his attorney is denied. Ruling for — on Application for permission of White and Horan to withdraw is reserved and time to move or plead is continued until March 3." Then on March 3, two days later, there is an Order signed by Judge Hyland reflecting that, "The defendant appears personally; Mr. Denton was present. Also appearing is Attorney Gary L. Robinson. Defendant indicates that he wishes Gary L. Robinson appointed as attorney to represent him in this matter, and after discussion on the record with defendant and Gary L. Robinson, the Court appoints Gary L. Robinson, Attorney, to represent defendant at expense of Linn County, Iowa, and the request of Mr. Horan and Mr. White to withdraw is granted." Now that occurred on March 3. So there were apparently two appearances in court in con-

nection with that matter: March 1, when Mr. Koehler was there; March 3, when Mr. Robinson was there and was then appointed. And then the record further shows that on March 8 Mr. Robinson filed an Application requesting that Donna Paulsen be appointed to assist him, and an Order was entered March 8 appointing Donna Paulsen, that also by Judge Hyland. Does that help?

Mr. George: Yes, Your Honor.

By Mr. George:

Q. Does the Court reading from the court file agree with what you recall in this matter?

A. Yes.

(Sup. Ct. App. 74) Q. Was she present?

A. No.

Q. Did you have occasion to discuss these matters again at any later time?

A. Yes.

Q. I'm sure you're familiar with what you said. Could you go over exactly what you said from the point of your being in Love's apartment for the second time on the 8th?

A. You want to know of the incident itself, right?

Q. Right. But I'm more interested in whether a weapon was involved, and I'd like for you to start just prior—

A. Okay. From Calvin Love's apartment.

Q. —to the stabbing. Right.

A. I was in Calvin's Love's apartment with two other — two other mens, Derrick Doolin and Terry Fowler, and we were discussing about some marijuana that Calvin owed me part of the marijuana. And so Calvin was intoxicated. I couldn't say what he was intoxicated on, but I know he had been drinking some alcohol, and I know that he shot heroin and so forth. But I couldn't tell. But anyway, we was discussing about the marijuana. And so Calvin got very upset. But any — but I wasn't talking to Calvin. Doolin was. And I was standing over behind Doolin. And so he got very upset with Doolin, and just like he wanted to have a hassle with Doolin. So I didn't want anything to do—

(Sup. Ct. App. 75) Q. When did you first have an opportunity to discuss this case with Mr. Robinson?

A. At the Linn County Jail.

Q. Was that after the appearances in court?

A. Correct.

Q. So it was sometime in March?

A. Correct.

Q. And at that first meeting at the Linn County Jail, what occurred between you?

A. We kind of went over the -- what happened and so forth, and that was about it really.

Q. Was that the first time that you relayed to Mr. Robinson what occurred?

A. Yes.

Q. And at that time what did you tell him with regard to weapons involved in the crime?

A. Well, I told him exactly what happened in the crime, and that I also saw weapon in Calvin's hand, and nothing, you know, took place at this time.

Q. And this would have been in early March?

A. Correct.

Q. Was this prior to the time that Donna Paulsen was appointed to be co-counsel for you?

A. I can't recall if she was appointed — yeah. Well, yes, I can say yes that she was appointed at the time, yes.

(Sup. Ct. App. 76) The Court: I'm sorry. What?

A. Like he wanted to have a hassle with Doolin about it. So I didn't want anything to go down on my behalf with Doolin with Calvin, so I kind of interrupted the conversation, and I said — well, I said — Calvin kind of moved in front of Doolin like this (indicating), and I say, "Well, Calvin, why don't you give me one or two joints or something, and we just sit here and smoke it or just leave." So he got — by that time, by me butting in — he was already hot — he just got really upset. So he told his girl friend, he say, "Give me my shit." And from the — from the stimulation of the — what conversation that we was having in the house, I know that's all he was talking about was a weapon when he say, "Give me my shit," you know, because him being so angry he wasn't talking about nothing else. And so the girl didn't move, to my knowledge. Was not to look around, because this guy could just bust my head if I turned my attention to this girl like this. But so when I was — when he said that, I kept — I was standing there like this, and Calvin reached underneath his pillow and he

pulled out a weapon in his hand. So my reaction was to — was to charge Calvin. But he jumped from the bed. When he pulled out the weapon he moved, he moved into me. And so I kind'a held my hand to keep the weapon away from me. Then I remember having a knife in my pocket, and I tried to warn Calvin so he wouldn't have to (Sup. Ct. App. 77) shoot all of us in that apartment, because I knew he was intoxicated, and he was drunk or high over some dope or something.

Q. What kind of weapon did he have?

A. I couldn't specify the type of weapon he had.

Q. Could you see the shape of it?

A. No. What I saw in Calvin's hand was something like when he pulled it out like this (indicating). I didn't see nothing else like a knife or something pointing, because he couldn't hold a whole knife in his hand. But when he went under the pillow and pulled it out, I saw it here. I saw the weapon here. (Indicating.) And so when he come toward me like that, so I kind of keep him away like this (indicating) and that was it.

Q. What did you think it was?

A. I knew it was a pistol. I had no doubt about it.

Q. And did you tell Mr. Robinson that on the first occasion—

A. Yes, I did.

Q. —that you talked to him about the facts of the case?

A. Yes.

Q. Did you tell Donna Paulsen the same thing the first time you discussed the facts of the case with her?

A. To my knowledge I — I don't know if I did or not. I'm not going to say I did. But if — I think I did. I'm not going to just put total confidence in saying I did, but I think I (Sup. Ct. App. 78) did.

Q. Early in your relationship with Mr. Robinson did he request that you prepare a written statement for him?

A. Correct.

(Defendant's Exhibit A was marked by the reporter.)

Q. I hand you what's been marked as Defendant's Exhibit A and ask you whether you can identify it.

A. Yes, this is my handwriting.

Q. And what is that document?

A. This is a statement that I written out to Tom Koehler. This is my handwriting here. I wrote this myself to Tom.

Q. Did you write that at the request of Gary Robinson?

A. No. I think I wrote this in a cell house, and I had this ready for Gary, I think — for Thomas, excuse me.

Q. When did you write—

The Court: Pardon? I didn't quite catch—

The Witness: For Thomas Koehler. I had this prepared for him.

Q. When did you write it?

A. It's dated February 28, '77.

Q. And is that the date that you wrote the statement on?

A. Yes.

Q. Was that prior to the time that Gary Robinson was appointed to represent you?

A. No.

(Sup. Ct. App. 79) Q. Are you certain that that wasn't prior to the time that Mr. Robinson was appointed to represent you?

A. Well, this was — this was before. Even Gary wasn't even in the — wasn't even being thought about at the time.

Q. Okay. So it was before he was appointed by the Court?

A. Yes, correct.

Q. And did you make that statement available to anybody?

A. Nobody but Tom Koehler.

Q. Did you ever give a copy of it to Gary Robinson?

A. Not this, no.

Q. Now in that statement that you've prepared there, did you relate the same thing that you previously related here with regard to weapons being involved in the crime?

A. Correct.

Q. Who did you give that statement to?

A. Thomas Koehler.

Q. And when did you give it to him, if you can recall?

A. I can't recall the exact date when I gave it to him.

Q. How did you make it available to him?

A. He — I think he was over at the jail visiting me, I think, and I think that's where I gave it to him at.

Q. You didn't mail it to him?

A. No.

Q. Did you know that Mr. Robinson had a copy of that statement?

A. No, I didn't.

(Sup. Ct. App. 80) Q. What was Mr. Robinson's response to your statement that Calvin Love had a gun just prior to the stabbing?

A. When I first — when I first indicated to Mr. Robinson about the weapon, his response was that, "We have a good case to argue," and this is about the general way it was about.

Q. Okay. He didn't take issue with the fact there was a gun involved at that time; is that right?

A. No, not at the time, no.

Q. Is this the first time that you told him the story that you're talking about now?

A. Yes.

Q. Did his position regarding the gun subsequently change?

Q. And how did it change?

A. When it got close — when it got close to trial, somewhere like about two weeks before trial, I got — I got very nervous about coming to trial, because there was no weapon, you know, was present. And so I indicated to Attorney Gary Robinson, I say, "I don't think we should go to trial right now because we should produce this weapon. This is my only proof that I have." And he — his response was that, "Well, there's just no weapon. We just can't find a weapon. There's no weapon involved anywhere. We just can't find one." So I was just left right there, you know.

Q. Did you go over the questions that Mr. Robinson would ask you (Sup. Ct. App. 81) at trial, before the trial?

A. Yes.

Q. And as you went over the questions, did the two of you come into conflict with regard to whether or not there was a weapon?

A. I couldn't — I couldn't say a conflict. But I got the impression at one time that maybe if I didn't go along with — with what was happening, that it was no gun being involved, maybe that he will pull out of my trial.

Q. Did he ever tell you he would not represent you if you maintained that a gun was in the possession of Love just prior to the stabbing?

A. I can't recall that, if he did. But my impression was that he was going to.

The Court: Miss Houg, would you go back and read to me the answer he gave that started out, "I got the impression." (Lines 6 through 14 were read by the reporter.)

Q. Did Mr. Robinson ever make any kind of a statement in that he would withdraw or he wouldn't represent you if you maintained a gun was involved in the crime?

A. No. He indicated that to me, did I want him to withdraw from the case.

Q. He asked you that question?

A. Yes.

Q. And when did he ask you that question?

(Sup. Ct. App. 82) A. He asked me that question over at the jail, and I can't recall the exact date when it was, but those was his questions to me.

Q. Do you recall whether it was shortly before trial?

A. Yes, it was.

Q. What do you mean by "shortly before trial"?

A. Somewhat like about a week and a half, maybe two weeks at the most.

Q. And at the time he asked you that question, what were you discussing with him?

A. My main concern at the time was the weapon that Calvin had, and that's what we was discussing.

Q. Is there any doubt in your mind that Calvin Love did have a gun on the 8th?

A. Was there any doubt in my mind that he had a gun?

Q. Right.

A. Yes, I knew he had a gun. (Sup. Ct. App. 83) I did. But, you know, I can't recall if I did tell her. But I am sure that I told her about the incident that I indicated the weapon. But I can't recall. My memory is not that well from that time.

Q. And as I understand it, you had told them about the gun, and was it just Mr. Robinson that told you not to mention the gun?

A. Yes. No, Ms. Paulsen wasn't nowhere involved at the time, no.

Q. Okay. So Mr. Robinson told you to say just that you thought you saw a gun?

A. Yes, correct. Because no weapon was found.

Q. And you believed at one time that Tom Koehler was going to be your lawyer; is that right?

A. That was my belief.

Q. Well, when did you figure out that Mr. Koehler wasn't going to have anything to do with it?

A. Well, we went so far into the trial, and what Gary came and told me, he was going to be my lawyer, you know, and so I was still under the influence that Koehler was going to just take over, but I did never think he was just going to total — wasn't going to be my

lawyer at all. But I never did think that he would just — just put me off and that was it, you know.

Q. Well, now didn't Judge Hyland explain to you as — do you remember Judge Vietor just read — we're talking about what date you first saw Mr. Robinson, and Judge Vietor read that (Sup. Ct. App. 84) Judge Hyland denied the appointment of Thomas L. Koehler and he appointed Gary Robinson. Do you remember that?

A. Yes, I remember that.

Q. Don't you remember that at that time Mr. Koehler stated that Mr. Platt was representing Mr. Doolin, or I believe it was Mr. Doolin, and that Mr. Koehler could never represent you because interests were conflicting; don't you remember that?

A. Yes, I remember. But also it was — it was some other conflict that was involved too. It was something like it was two lawyers in the same office or something, the reason why Doolin like this — okay, but to say one lawyer was going to go — Doolin was not going to have this lawyer, something like this, and Koehler — Koehler and I was having a conversation, and he was telling me, he said, "Well, Gary is going to open the trial up and I'm going to come in." So I was under the influence that Koehler was going to come in at all times.

Q. Well, from March 3rd on, you never saw Tom Koehler once?

A. No.

Q. Now did you ever indicate to anyone that you were dissatisfied with the representation that Mr. Robinson gave you?

A. Well, no. I thought that — my interpretation of the lawyers, that they was doing a good job, you know, until they come and told me that we couldn't have — we didn't have no weapon; we can't produce a weapon, you know. And (Sup. Ct. App. 85) I was going to do the same thing with Tom Koehler. This weapon had to be produced.

Q. Now you indicated that until the weapon thing came up, you were satisfied with what Mr. Robinson was doing?

A. Totally satisfied.

Q. Now it is — it is true though that you — do you recall that shortly after we argued the case and the jury left the room that Judge Vietor asked you if you were satisfied with your lawyers?

A. Um-humm.

Q. And didn't you tell him you were?

A. Yes.

Q. And isn't it fair to say that your dissatisfaction with your lawyers dates in fact from the time the jury returned the verdict?

A. Repeat that for me again.

Q. Isn't it a fact that your dissatisfaction with your lawyers dates from the time the jury returned the verdict, that's when you were dissatisfied with your lawyers?

A. No, no. Not at all. Because when we couldn't produce that weapon, I was just — I was all dazed from the total beginning when we first talked about that wea-

pon. I was just going through court hoping that maybe that what he told me, like "Just say you thought he had a weapon," and you go on this assumption, well, I thought maybe at that time, well, everything's (Sup. Ct. App. 86) — everything is already — is already fixed, you know, just like a weapon is being there, that he had everything altogether for me.

PORTION OF ATTORNEY GARY L. ROBINSON'S TESTIMONY AT HEARING ON SUPPLEMENTAL MOTION FOR NEW TRIAL

(Sup. Ct. App. 87) Q. Gary, would you state your full name?

A. Gary Leo Robinson.

Q. And your occupation?

A. I'm an attorney.

Q. How long have you practiced law?

A. Oh, a little in excess of three years — four years. Excuse me.

Q. Are you acquainted with Emanuel Charles R. Whiteside?

A. Yes, I am.

Q. Did you represent him earlier on a murder charge this year?

A. Yes, I did.

Q. Were you retained in that matter?

A. No, I was not.

Q. Were you requested by Mr. Whiteside as court-appointed counsel?

A. Well, the way that came about, I was in the courtroom — excuse me — the courthouse on March 3rd with a Mr. Wardell Dillon, a client of mine, and we were to appear in front of Judge Hyland. And this was something — there were people milling around out there, and Mr. Denton indicated that they were trying to find counsel for Mr. Whiteside, who had been charged with murder. Mr. Koehler came out and said that he had a conflict of interest, and would I be willing to represent Mr. Whiteside. He said he'd introduce me, and if it was all right with Charley, then it would be all right with him. So Mr. Koehler and I went back and talked to (Sup. Ct. App. 88) Mr. Whiteside, and he indicated that would be fine with him. And I advised Judge Hyland that I would be willing to represent him.

Q. Did this all occur on March 1st?

A. No, this all occurred on March 3rd. That was the first time I had ever met Mr. Whiteside.

Q. When did Mr. Whiteside relate the facts of the incident resulting in Love's death to you?

A. The same day Judge Hyland appointed me and gave us, I believe, an additional five or six days to move, plead or demur. And as soon as that was completed, I went over to talk to Mr. Whiteside in the Linn County Jail, and he presented me with the five-page statement, which has been introduced into evidence here today.

Q. Okay. So the same day you were appointed you got that statement from him?

A. That's correct.

Q. Approximately how many times did you discuss the matter of the facts in this case with Mr. Whiteside?

A. Checking my time sheets, I represented Charley approximately 69 days, and the time sheets indicate that I saw him at least 23 times, so I was seeing him about once every three days.

Q. And those 23 times were at the jail?

A. They would be mostly at the jail. There would be occasions (Sup. Ct. App. 89) when I would see him prior to a hearing or after, something of that nature, where we would tell him either what was going to happen or what had happened with respect to procedural matters concerning his case.

Q. How often did Ms. Paulsen go with you to the jail?

A. Not very many.

Q. What did Mr. Whiteside tell you with regard to Calvin Love having a weapon prior to the time he was stabbed?

A. Well, the first thing I did was read the statement. Could I have the statement please. And the statement caused me considerable consternation. Because the way I interpreted the statement, it amounted to a confession to first degree murder. And I asked Charley particularly about the matters as were related on page 4,

the top of the page, starts out, "She didn't move. I turned back to Calvin, which he was pulling a pistol from underneath the pillow on the bed, which he way laying on. At this time I reacted. I stabbed him, I thought in the shoulder, he still reaching, I stabbed him again." Now my interpretation of that was that he had stabbed Calvin Love twice while Calvin was sticking his hand under a pillow. That's the way the thing reads. Now he indicated to me at that time that, well, he had sort of had a little help preparing this statement and that the words in here weren't 100% his. And I said, "Well, okay, that's fine. Let's ditch the statement. And what happened in your (Sup. Ct. App. 90) own words?" He related what happened. I ask him if he saw a gun. He indicated that he did not but that he was convinced Calvin had a gun, because he had known Calvin before. They had served time together. And in his own mind he was convinced that Calvin Love had a gun or weapon. I said, "Well, we'll have to see one way or the other. It's important to know." But that the mere factual existence of a gun would not destroy a self-defense case. And subsequently to that we did investigate. I was in the building where the incident occurred in Calvin Love's room, conducted a search. We talked to everybody that was there that night. We talked to the building manager. There was no gun.

Q. Did Charley say who helped him prepare the written statement?

A. Yes. Mr. Dillon.

Q. Did he say what effort — what Mr. Dillon put into the statement?

A. Mr. Dillon's part in the statement, I gathered, was structuring it in a proper fashion. And I advised Mr. Whiteside that I — one, I never wanted to see anything in writing from him again, because when you write something in the jail the chances of it ending up in the hands of the jailer are very good, or in the hands of another prisoner, and if he wrote something like that, it could come back to haunt him. And so I just said that it's not a good idea to write that. I said, "If you have any questions, you call me and we'll talk (Sup. Ct. App. 91) about them. But," I said, "I don't want anything in writing because it will turn up at a later time."

Q. In the version of what happened that Charley gave you, after you received this letter, did he indicate the same thing that he had stated in the letter?

A. No. Charley's version of the events was basically the same throughout: That he was convinced in his own mind that Calvin had a gun. But he had never actually seen it. And that is consistent with the events as set out in the letter.

Q. At what point in time did you investigate, including going to the scene of the crime and talking to the people who were there?

A. I went to the scene of the crime, I believe, within two or three days after I started representing him. And then we talked to all the people that were there, by way of depositions, and those took—it took some period of time to do them. I know it took two full days and part of another day, and that was probably three weeks to a month later. And then I spoke with Mr. Fowler and Mr.

Doolin off the record, and Mr. Fowler was never deposed. Mr. Doolin was deposed, but he was deposed by the State.

Q. Okay. Your investigation was almost a month after the incident then on the 8th?

A. Well, my investigation in talking to the people was. My investigation of the building was not. It was very close (Sup. Ct. App. 92) to the time of my appointment.

Q. Approximately how soon after the crime was committed were you appointed?

A. Let's see. Calvin was murdered on the 8th of February, and I was appointed on March 3rd. Whatever number of days elapsed there.

Q. What steps did you take in your investigation of the scene?

A. We went into the building, went downstairs and talked with the manager, to ascertain which apartment Apartment M was, and where it was at. The manager accompanied us upstairs, and we observed that the door was locked. I believe he had to go look for some keys or something. He opened the apartment, and we went in. We were probably in the apartment, I would say, half hour to 45 minutes. We also talked with Mr. Stout, who subsequently was a witness, at that time also.

Q. In your conversations with the investigating officers, did you discover the apartment had been broken into after it was sealed by the police?

A. Yes.

Q. And when did that occur?

A. That occurred after Officer White, who had responsibility for securing the building, had completed his investigation and had locked the door to that apartment. And he had simply left the key with—I believe one of the captains, for Kathy Sauer to pick up. Officer White indicated that there (Sup. Ct. App. 93) was nothing further to do as far as the police were concerned. Their investigation was complete. Kathy Sauer indicated that she didn't have a car to go to the police station. So she authorized or told Mr. Stout to simply break in the door so they could move Mr. Love's and her stuff out of the apartment.

Q. That was all prior to your investigation in connection with the case?

A. That's correct.

Q. From all you've learned about this case, was there an opportunity for a gun to be disposed of after the crime?

A. In my opinion, having talked to the people that were there, I would say no. I base that opinion on several things: First, Kathy Sauer testified concerning the various times that things happened with respect to this case. She first indicated that Mr. Whiteside and Mr. Love came back to the apartment sometime prior to 10 o'clock on February 7. She based that on the fact that there was a T.V. movie on. The girl who played Rhoda was in it. She was correct, there was one on. Valerie Harper was in it. It was on NBC and it started at 8:30 and ended at 10:00. She said that Mr. Whiteside was there approximately 15 to 20 minutes; when he left, the news was still on. She then testified that he came back at 2:15, or there-

abouts, because she looked at the clock. That the incident itself happened very quickly. The police (Sup. Ct. App. 94) testified, all of the officers who were dispatched to the scene, that the calls came in at approximately 2:16 or 2:17, which supported Kathy Sauer's version at least as to the times. Now for her to have gotten rid of the weapon would have required considerable more foresight on her part than she exhibited either at the deposition or at trial. At the trial she wasn't sure whether she was in front of the grand jury, the district court jury or what. She didn't recall whether she'd ever seen me before. She just sort of knew what had happened that evening and that was really about it. The officer who investigated, Officer White and Officer Kinkead, had gone over the apartment and had looked under the bed and looked under the pillows, things like that, with the idea of trying to find the knife that had been used to kill Calvin, but they had not observed any other weapons or anything of that nature. Kathy Sauer had indicated that she pulled open one drawer of the cupboard or chest of drawers to give the marijuana back to Mr. Whiteside when he demanded it. Officer White testified that there was one drawer of the chest of drawers open at the time he came back for his investigation. From that I simply drew the conclusion that the events had happened pretty much in the sequence Kathy Sauer had indicated and that they happened fast enough that she did not have time to even close the drawer from which she had taken the marijuana out of.

(Sup. Ct. App. 95) Q. How many times have you represented persons charged with murder?

A. This was the first time.

Q. Have you had any experience in investigating criminal matters?

A. Yes.

Q. And what experience have you had?

A. Every criminal case I've done for the last four years I have investigated.

Q. Okay. And approximately how many criminal defendants have you represented?

A. Upwards of 40.

Q. Have you ever used a professional investigator in any case?

A. Once. First criminal case I had.

Q. Did you use a criminal investigator in this case?

A. No.

Q. Can you tell me why you did not?

A. First criminal case I had involved some tire slashings and carrying a concealed weapon in Waterloo, Iowa. I employed a professional investigator to check out, to get me witnesses who might have seen what had happened, to talk to the various people involved, to get a copy of police report and to give me a written report. Three weeks later I was still asking for those same things. I decided I could do it better myself.

Q. When you say that you represented 40 criminal defendants, have you gone to trial on 40 cases or is that the total (Sup. Ct. App. 96) number of criminal—

A. That would be the total number.

Q. Do you know how many of those cases went to trial?

A. Felony or misdemeanor?

Q. Felony.

A. I would say eight to ten.

Q. Do you recall having a discussion with Charley just prior to trial or within two weeks of trial concerning his testimony?

A. I had discussions with Mr. Whiteside in the two weeks before trial practically daily. Most of them would have been concerning either what his testimony was or what we anticipated other people's testimony was going to be.

Q. At any time did you have a conflict with him with regard to what he was going to testify to?

A. No.

Q. Did he indicate at any time that he intended to testify that he did see a gun in the possession of Calvin Love just prior to the stabbing?

A. No. He indicated that he wanted to say that. He did not indicate that he had actually seen one.

Q. And he said this just before trial?

A. As I recall, on May 3rd and on May 4th, Ms. Paulsen and I had gone to the county jail where Mr. Whiteside was, for the purpose of explaining to him one more time what the plea bargain was, or what the proffered plea bargain was, what the (Sup. Ct. App. 97) State would probably use as evidence against him, what we

thought the outcome would be. Then I went over the written questions that I had prepared and Donna critiqued them, just simply whether his testimony sounded believable or not, grammatical errors, errors—for instance, he said in response to one question that he was pissed off at Calvin. And we asked him if he really wanted to say that in front of the ladies and gentlemen of the jury, and he indicated that no, he probably didn't. In the course of that he made reference to seeing something "metallic" I think is what he said. I don't think he ever did say a gun. And at the end Donna asked him about that, because that was the first time it had even been mentioned either to her or to myself. His response to that was, "in Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead." I explained to him at that time that it was not necessary that the gun be physically present for self-defense, one; two, that to say that would be perjury on his part because he had never at any time indicated that there was a gun, and that he was just simply saying it now to us because he felt if he didn't say it he'd be convicted; three, that we could not allow him to do that because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; four, I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that (Sup. Ct. App. 98) I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony. I told him that there was no need for him to lie about what had happened, that he had a good and valid defense on the facts as he had related them to us, and we felt we could present a good self-defense case on the facts he had stated to us.

Q. You say that the first time that he mentioned a gun was just prior to trial in your preparation?

A. Other than in the letter, and the reference there was simply as it had been during the course of the preparation: That he knew Calvin had a gun. And he testified at trial that he knew Calvin had a gun. What we're talking about here is the difference between actual and constructive knowledge. Charley in his own mind was convinced that Calvin had a gun. Well, that would be similar to me being—standing in a darkened—or standing in a room with no windows and seeing you come in covered all wet. I would know in my own mind that it's raining, but until I actually go outside and see it, I don't have any actual knowledge that it's raining, and that was the situation we were in with Charley. Constructively he knew Calvin Love had a gun, but he actually did not.

Q. He never described anything such as he described here today with regard to something in Charley's hand when he pulled it out from under the pillow?

(Sup. Ct. App. 99) A. No.

Q. But he had mentioned the pillow?

A. He had mentioned that Calvin's hand had gone under the pillow.

Q. But other than in the letter, he never mentioned that he pulled his hand out?

A. He indicated that Calvin had attacked him. And I asked him that, "Well, when he attacked you he would have had to have been coming at you front-on, because the stab wound was right in the center of the chest." And he

said that was correct. And I said, "Well, did you see anything at that time?" And he said, "No." He said, "It happened too fast."

Q. In your experience do you think that this case would have been stronger in terms of a defense had a gun been found?

A. Yes.

Q. But since no gun was found, do you think that it would have weakened the case for Charley to take the stand at trial and say that there was a gun?

A. Not if that's what he saw, no.

Q. And in terms of the effect on the fact findings, would it—do you think that it would have weakened the case?

A. I don't think so. I think it would have strengthened it. Because, for one thing, we tried to create a gun. We tried to manufacture one practically out of nothing. We found two people, Wardell Dillon and Officer Mike Birmingham, who had seen Calvin Love with a gun at one time. Dillon had seen (Sup. Ct. App. 100) him as late as '76, and Birmingham had seen him with a sawed-off shotgun. Both people were called. And we were able to get the State to stipulate that Love had been arrested in Linn County, had been convicted in Linn County of carrying a concealed weapon, and that that weapon had been a sawed-off shotgun. We also sort of attacked Officer White because he didn't open all the drawers of this chest of drawers, and because the apartment had been cleaned out, with some sort of innuendo that there was a gun. So we

were trying to create in the mind of the jury that, "Sure, there was a gun there."

Q. When the matter came up that Charley was planning to say at trial that he actually saw a gun, did you at any time indicate to him that if he did that you would withdraw as his counsel?

A. I told him that I would advise the Court that I thought he was going to commit perjury. That if he did do that, that I would ask the Court for permission to withdraw based on that. Under the Canons I simply couldn't be part, you know, of any kind of action of that nature.

Q. Did you discuss that matter any further than you've already indicated today?

A. No, that was the only time it came up.

Q. Do you recall approximately when this was in relation to the trial?

A. It was either May 3rd or May 4th.

(Sup. Ct. App. 101) Q. And the trial was?

A. May 9.

Q. At trial did you ask Charley whether or not Calvin Love had a gun, actually had a gun?

A. I think the question was, "Did you think Calvin Love had a gun?" I believe the response was, "Yes." In fact—and there was another question, and he said, "Yes, I knew he had a gun."

Q. But he wasn't asked the question directly whether or not he saw a gun?

A. No, he was not. I take that back. Mr. Denton asked it to him, and he said no, he didn't see a gun. But that was on cross-exam.

Q. Prior to the time that question was asked, you had discussed this matter with him and the things that you've indicated here today had transpired?

A. Yes, that's correct.

Q. After you discussion with Charley with regard to what you would have to do if he did take the stand and say that he saw a gun, were you convinced by him that he was going to testify that he only thought he saw a gun?

A. I wasn't sure whath e was going to do because, as I recall, that conversation we sort of just left it right there, and then said, "You know, we'll be back tomorrow and you let me know." And as I recall, we came back the next day and went (Sup. Ct. App. 102) over the questions again, and he just dropped it entirely. He didn't bring it up again.

Q. Do you feel that your conversation with him with regard to the possibility of perjury and what you would have to do as the result of that, influenced him in terms of what he did say at trial?

A. I'm sure he did not want me going to Judge Vietor and telling Judge Vietor that I thought he was committing perjury.

Q. So you do think that that did influence him?

A. I think it forced him to tell the truth, yes.